(2)

APPENDIX

TO THE PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

No. 01 203

AUG - 1 2001
OFFICE OF THE CLERK

In The

Supreme Court of the United States

Melvin E. Blough,

Petitioner

v.

United States of America,
United States Department of the Treasury,
Paul H. O'Neill, Secretary of the Treasury,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Volume B

156 pp.

DEPARTMENT OF VETERANS AFFAIRS
Regional Office
PO Box 1437
St Petersburg FL 33731-1437

March 19, 1997

In Reply Refer To:
317/271C-7935
C 25 707 037

Mr. Melvin Blough
803 Tomahawk Trail
Brandon FL 33511

Dear Mr. Blough:

The following certification is furnished for use in determining entitlement to Civil Service Preference for the spouse of a service connected disabled veteran.

This is to certify that the records of the U.S. Department of Veterans Affairs (VA) disclose that Melvin Blough enlisted September 25, 1968, was separated August 31, 1971, from the Armed Forces of the United States and has an existing service connected disability. The percentage and nature of the service connected disability is shown below:

PERCENT	DISABILITY
100%	Amputation, below knee, bilateral
60%	Wound, left upper extremity with fractures of metacarpals and incomplete paralysis, left median nerve, with complete paralysis, left ulnar nerve.

30%	Splenectomy
30%	Recurrent urethral condylomata with urethral stricture, p.o.
20%	Wound, pelvic girdle, mg XV
10%	Laceration, external cutaneous nerve, right thigh
10%	Wound, abdomen with laceration of liver

100 percent Combined Percentage

The veteran is not currently rated as unemployable due to service connected disabilities. The veteran is permanently and totally disabled.

Sincerely yours,

"S/Bill Bryant"
BILL BRYANT
Veterans Services Officer

271C/

Internal Revenue Service **Department of the Treasury**

District Director

477 Michigan Ave.,
Detroit, Michigan 48226

Person to Contact:
Velma VanDuvall
Telephone Number:
(313) 226-7216
Refer Reply to:
RM:P:ERTS
Date:
May 21, 1979

Mr. Melvin Blough
P.O. Box 79
Ypsilanti, Michigan
48197

Dear Mr. Blough:

I am pleased to confirm our commitment to you for the position of Internal Revenue Agent with post-of-duty of Detroit, Michigan. You are scheduled to report for duty to Room 2411 McNamara Building, 477 Michigan Avenue, Detroit, Michigan at 8:00 a.m. on July 9, 1979. Your appointment will be at the GS-7 level with a salary of $13,014 per year. We are looking forward to you joining our organization and hope that your entrance on duty will be the start of a successful career in the federal service.

I wish to point out that your appointment is subject to a satisfactory report of character investigation and satisfactory completion of the training period. In addition, you are required to place yourself at your first post-of-duty at your own expense.

A character investigation conducted by officials of the Service will be initiated prior to your entrance on duty. Therefore, the enclosed papers (or those we have

previously furnished) must be completed and returned as soon as possible. If at all possible we prefer that you return these papers personally so that the information can be reviewed with you and you can be fingerprinted. We suggest that you call Velma VanDuvall in Detroit at 226-7216, to arrange for a date and time for the return of your processing papers. In the event that such an arrangement is not possible, we can complete the necessary negotiations by mail.

As you already know, the training program consists of both classroom and on-the-job training. We must stress the classroom phase is geared to a rapid pace and the trainee must keep pace with the program.

We suggest that you carefully consider the information submitted on the original application. In the event you overlooked any period of employment regardless of duration, any arrests, discharges, or if you have misleading statements relative to reasons for leaving places of employment, you should submit a supplementary statement to your original application. If information received during the preliminary check with employers or references is of a derogatory nature, this commitment will be cancelled.
If you have served on active military duty and/or claim veterans preference, it is necessary that you furnish either a copy of your discharge (DD 214) from the military service or evidence from the military service verifying your periods of active military duty.

You must also furnish a complete transcript showing courses, grades, and completion of your academic studies.

Please acknowledge receipt of this letter by return mail indicating whether or not you are accepting this commitment.

Sincerely yours,

"S/Lee Miller" Chief,
Employment Programs
Section

Attachments

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MELVIN E. BLOUGH, Plaintiff, vs. ROBERT E. RUBIN, Secretary of the Treasury, Defendant.	CASE: 98-1358-CIV-T-24E Tampa, Florida February 26, 1999 8:30 A.M.

TRANSCRIPT OF PRELIMINARY INJUNCTION PROCEEDINGS BEFORE THE HONORABLE SUSAN C. BUCKLEW UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:
MELVIN E. BLOUGH
Pro Se
803 Tomahawk Trail
Brandon, Florida 33511
813/651-2778

For the Defendant:
WARREN ZIMMERMAN
United States Attorney's Office
Middle District of Florida
400 Tampa Street, Suite 3200
Tampa, Florida 33602
813/274-6310

Court Reporter: Carol J. Jacobs, RPR, CP
Official Court Reporter
801 N. Florida Avenue
Tampa, Florida 33602
813/301-5024

Proceedings recorded by mechanical stenography; computer-assisted transcription.

(Call to Order of the Court at 8:55 a.m.)

THE COURT: All right. If I could have plaintiff sit to my left and defense counsel sit to my right, please.

The next matter, which is actually set for a hearing on a motion for a preliminary injunction, is -- I'm going to make an attempt to pronounce it, you correct me if I'm wrong -- Blough versus Rubin, Secretary of the Treasury. And this is Civil Case 98-1358.

How do you pronounce your name, sir?

MR. BLOUGH: That's correct.

THE COURT: Blough?

MR. BLOUGH: That's -- Blough.

THE COURT: All right. Mr. Blough, you are appearing pro se and will be representing yourself in this hearing; is that correct?

MR. BLOUGH: That's correct.

THE COURT: Okay. And Mr. Zimmerman, you are here on behalf of the government.

MR. ZIMMERMAN: Yes, Your Honor.

THE COURT: Okay. We have a couple of preliminary matters before we actually begin this hearing.

Mr. ZIMMERMAN, I'll direct my first question to you. There was a document filed by the defendant extending time to respond to plaintiff's request for sanctions. I note this morning, when we ran it, it had been withdrawn. And my first question was going to be what request for sanctions?

MR. ZIMMERMAN: Your Honor, that was the reason it was withdrawn. This case was previously assigned to another assistant who had received in the mail the service of a motion for sanctions under Rule 11 and had not realized that that was merely the service and not the filing of the motion. The plaintiff had properly availed himself of the safe harbor provision of Rule 11. So, in essence, we had erroneously asked to extend the time to respond to something which was not yet ripe or even filed. So we withdrew it.

And if -- I'll talk to Mr. Blough after this hearing and see if that matter can be resolved. If not, I'm sure he'll file it and we'll respond within ten days thereafter.

THE COURT: All right. Let me just ask another question of you. Mr. Blough also filed -- well, filed an initial preliminary injunction and then there was an emergency motion which I considered an additional memorandum to the original preliminary injunction. Subsequent to that time there was a motion for leave to file additional memorandum in support of motion for preliminary injunction, and there was a document --a rather thick document filed. And I just am not entirely comfortable with my docket sheet. Has the government filed anything in response to that motion?

Are you aware of it?

MR. ZIMMERMAN: I have in my possession what appears to be an equally thick document that I assume is the one Your Honor is referring to.

THE COURT: It is titled motion.

MR. ZIMMERMAN: Right. Right. I guess until now I had not realized that this was separate and apart from what I had understood to be his motion to amend his request for preliminary injunction, which the court had treated as just a supplemental memorandum, I guess. Let's put it this way: I don't have any objection to his filing this, if that's the court's inquiry. And I'm prepared to go forward today with oral argument without having filed a written response, unless the court would insist upon a written response.

THE COURT: No. I just wanted to know your position. I'll grant the motion then by the plaintiff for leave to file an additional memorandum in support of the motion for preliminary injunction.

All right. Then, Mr. Blough, I was going to direct a question to you regarding the February 16 th pleading, which is styled motion. But since the government has no objection to your filing that, then it will remain as filed and I think we can proceed.

So that I might tailor this argument just a little bit, it seems that the government has tailored their response to your motion for preliminary injunction and has really keyed in on two issues, two of the four that you must meet in order to obtain a preliminary injunction.

The first is that the government has stated that you have not shown and they don't believe you can show a

substantially likelihood of prevailing on the merits of this claim, or the underlying claim. And the second is that you have failed and cannot show irreparable injury.

So, although there are actually four prongs, as I think you are aware of, I think those are the two where you probably need to concentrate any type of argument or anything else that you want to present this morning.

MR. BLOUGH: Okay. Could I mention something at this time?

THE COURT: Sure.

MR. BLOUGH: The submission on the 16th was actually -- as I read your Local Rule 4.06(b)(1) there, it says five days or -- (b)(2), actually, five days prior to the hearing we shall submit all information that we propose to substantiate our case.

THE COURT: Okay. If you are going to address me, unless you have a problem standing, you'll need to stand; if you do, just tell me.

MR. BLOUGH: Yes. Right. Okay.

THE COURT: Is there any problem?

MR. BLOUGH: No, there is no problem.

THE COURT: Okay.

MR. BLOUGH: So that was in effect a five-day response -- actually, you know, I gave him ten days to respond -- or notice that those were the items that I was going to depend upon at this hearing. And I guess my question is why didn't the government come forward with their response to my response? I mean it

says they have to -- the day before the hearing they are to submit to the court and myself their -- the items that they will--their response to my initial complaint. So I'm wondering what's -- we don't seem to have a -- it wasn't really a motion I was filing. I noted the court on the section page. I said I was uncertain if it was a -- if it was a motion under 301(b) or 406(b).

THE COURT: Okay. We really just -- we don't have all morning to do this. I've deemed it as filed. So I think your argument is moot. The government hasn't filed anything. I'm not sure if they're going to present anything this morning or they're just going to rely on the pleadings as they have been filed, which they are entitled to do as well. So you actually have the burden here.

MR. BLOUGH: Okay. This is my submission, what you have, in support of this preliminary injunction.

THE COURT: I have it.

MR. BLOUGH: Okay. And the question, I'm sorry?

THE COURT: Well, this is your opportunity -- we set it for a hearing so that you could make any type of argument that you wish to make and be heard, if you wish to be heard. If you want to only rely on what you have submitted in your pleadings and the pleadings of February 16th, you can do that as well.

MR. BLOUGH: All right. Okay. In addition to that, I would like to point out, of course, which I just have, the government has not responded. I have made four, basically, allegations of additional harassment after the time I filed my complaint. I don't have a response from the government to those four allegations. And, also, they did attempt to respond to one, but I felt it

was -- there were so many misrepresentations in that response, that" why I asked for sanctions. I asked the counsel for the defendant, that I might actually go for sanctions against that response. And I'm kind of setting here, I don't know what the position of the government is as far as those four allegations. And I think that --

THE COURT: Well, let me ask you -- what I am here on today is a motion for a preliminary injunction. So I -- let me ask you a question: What is the irreparable injury that you will suffer, or you believe you will suffer, if this court does not grant your preliminary injunction this morning?

MR. BLOUGH: I believe it has already happened and I believe it will continue to happen if the court doesn't enter an injunction to protect me from the government --I think what has happened is the agency has become so abusive, Congress stepped in, they restructured the IRS and so forth, and they have done their part. But I'm setting here and I am still receiving this harassment from the government and this discriminatory treatment. And now I'm asking the court to step in.

THE COURT: What is the -- yeah, but that -- you know, that's a part of your lawsuit. In order to get a preliminary injunction, you have got to show irreparable injury. If this court -- in other words, if I don't grant this preliminary injunction, there's going to be something happen to you that can't be made right by monetary damages, for example, cannot be made right by the court at the close of the trial in this matter, some reason --I mean this is a very serious thing that you are asking me to do. I hardly ever grant preliminary injunctions. So you have got to show me that this is a special circumstance that if I don't do this then something is going to happen that I

can't make right or you can't make rightby the lawsuit and the resolution of the lawsuit.

MR. BLOUGH: Right. I understand. I think the test is in the Fifth Amendment, the protection of my liberties. I think I have been deprived of my liberties.

THE COURT: How is it you have been deprived of your liberty or will be deprived of your liberty if I don't grant this?

MR. BLOUGH: Basically they don't have a right -- I'm a totally disabled Vietnam veteran; okay? And I think that the class of Vietnam veterans that are totally physically disabled, there's only 52,000 of us in the whole country, out of 25 million people. We are very, very small. Yet we went and gave something for this country. And I have a right not to expect the federal government, someone within the federal government, to threaten me with physical harm, push me down a flight of stairs. I don't have -- they don't have the right to do harassment, they don't have the right to retaliate against me. They don't have these rights.

THE COURT: What is it you want me to enjoin? What is it you want me to stop?

MR. BLOUGH: I want you to stop the harassment. I want you to stop them from trying to fire me or set me up or whatever it is they are trying to do. If they do so, let them come to you first before they fire me and say this is what we want to do. And if they are right, they are right. But I nned the protection of the court, because I'm setting here alone.

THE COURT: And why is it that you have some -- and I'm not saying by asking this question that even if you have some concerns that you may get fired that's a reason to grant a preliminary injunction, but why is it

that you have a fear that you will be fired if I don't grant this preliminary injunction?

MR. BLOUGH: Well, the four things I mentioned, even after the -- after I filed my lawsuit, I always thought like all citizens, you file a lawsuit, you are under the protection of the court. That's not true. These people will continue doing what they have been doing, because that's their pattern. I can get set up so easy -- easily. And, like, for example, they have access to all of my file cabinets and everything. If they choose to put some marihuana in the file cabinet, lock it up again, I'm stuck, I'm out in the street.

THE COURT: I can't grant a preliminary injunction based on something that you have a fear might happen, such as the example that you have given of planting marihuana in a file cabinet. Otherwise, you know, I would be granting preliminary injunctions in every case where someone had some sort of concern, well-founded or not.

MR. BLOUGH: What if we have a seven-year history of abuse? I think that would go into the matter. And a congressional reputation -- or congressional inquiries into the IRS and their activities. We have a very abusive culture here within the service.

THE COURT: Okay. I need you to be more specific. What is the irreparable injury that you will suffer, something that can't be corrected by this lawsuit, what is the irreparable injury you will suffer if I don't grant this preliminary injunction?

MR. BLOUGH: I don't know if I can make it until November, it is as simple as that.

THE COURT: You mean in -- what do you mean you don't know if you can make it?

MR. BLOUGH: Emotionally, let's say.

THE COURT: I'm sorry, say it again?

MR. BLOUGH: Emotionally.

THE COURT: I'm sure the court reported got that, but I didn't. And I don't have my -- she's not on my real-time.

THE DEFENDANT: Mentally/emotionally, let's say.

THE COURT: Oh, emotionally. Okay. All right. Mr. Blough, can you be more specfic with me?

THE DEFENDANT: No. Well, let's see, I have got a letter in there from a psychiatrist, as far as that is concerned. Nothing else. No, I just need --I need to be safe, I guess. I'm looking for some degree of security from the court, some protection.

THE COURT: Well, is it what you want me to do is to step in and say that you cannot fire Mr. Blough without first seeking permission of this court?

MR. BLOUGH: At least receiving concurrence, I would hope. I mean at least asking for concurrence. Maybe they don't have to -- they don't have to accept your verdict, but at least they could ask. Just take judicial notice, I guess.

THE COURT: And you're concerned that you may be fired?

MR. BLOUGH; I think there are a number of things they have done that would point to that direction, right.

THE COURT: All right. Mr. Zimmerman.

MR. ZIMMERMAN: May it please the court. Your Honor, in essence, Mr. Blough is asking the court to undertake the role of the overseer of the Internal Revenue Service in its personnel function. And of course with all that Your Honor has to do on a daily basis, it would be unrealistic to think that even an injunction as Mr. Blough imagines it would give him much mental or emotional security once he gets out the door and realizes that his job is still his job, he still has to go to work, and good things or bad things might happen, and he really won't be in much of a different situation at all than he would be without the injunction.

The request here is simply too vague. I believe that our Title VII and rehab act juris prudence, with the manner in which it treats retaliation as the equivalent of discrimination, is the greatest injunction, the greatest protection that a plaintiff could ask for. And if at such time Mr. Blough gets notice of some kind of adverse action, then he'll have ample opportunity to protect his rights, and that is that.

I might add that he's a distinguished IRS employee of 20 years with outstanding evaluations. There's no notice of adverse action pending. And, you know, who is anyone or who am I to predict what could happen in the future, but in terms of the standards for granting preliminary injunctive relief, there's no imminent threat of irreparable injury to Mr. Blough, much less a reasonable likelihood that he would even prove the so-called seven-year history or the discrimination that he has alleged in the case.

And for these reasons we would simply ask the court to deny the motion for preliminary injunction and to

allow the case to go forward and for Mr. Blough and me to move the case discovery-wise and get it going.

THE COURT: Mr. Blough, or Mr. Zimmerman, either one, I have set this case for trial when? In November? Is that when it is set?

MR. BLOUGH: Right. That's correct.

THE COURT: All right. You can have a seat. Mr. Blough, do you have anything in response to what Mr. Zimmerman said?

MR. BLOUGH: I think it is a rather simplistic view of the situation. I certainly don't agree with it. I think it is much more serious than they would present. It is as simple as that.

THE COURT: All right. Let me take about a five-minute recess, and then I'll come back and give you my ruling.

THE COURT SECURITY OFFICER: All rise.

(Recess at 9:15 a.m.)

(Call to Order of the Court at 9:25 a.m.)

THE COURT: Mr. Blough, I think I started out by saying a preliminary injunction is an extraordinary remedy and I hardly ever grant them. And that's accurate. Because what it does, it requires the court to prejudge the merits of a lawsuit, because I have to find there's a substantial likelihood of your prevailing, and that's very hard to do early on in any lawsuit. And I also have to find there is irreparable injury. In fact, the law requires that in order to grant it I must find that there is a substantial likelihood of success on the merits, irreparable injury will be suffered

unless injnction issues, the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party, and if issued the injunction would not be adverse to the public interest.

I think the two issues that we are concerned about this morning are the two issues that I laid out when we started, substantial likelihood of prevailing on the merits and irreparable injury.

I don't discount the fact that you -- this is probably a very emotional situation for you. And, you know, I'm old enough that -- I wasn't there like you were, but I lived through the Vietnam War, and I remember the times. And I have personally a great appreciation for it.

But I'm not going to grant this preliminary injunction. And there's just no basis for me to do it. I don't discount the fact that, as I said, that there is some emotional distress here and that you have a concern that you may be fired or concern that you may be set up. But that is not irreparable injury that the law looks at or the law allows me to grant a preliminary injunction for.

Even if you got fired, that would not legally really be a reason for me to grant a preliminary injunction and say reinstate Mr. Blough. At the end of the lawsuit, that may in fact, if that should have happened, that may in fact be a remedy. At the end of the lawsuit, should you prevail, there may be monetary damages.

But your concern that you may be fired or your concern that you may be set up in one manner or another or you may get disciplinary actions against

you in the future is not a reason to grant a preliminary injunction, because it is not irreparable injury that the law looks at that says, okay, Judge, Court, you need to step in and do something.

I can't oversee an agency or a corporation or anybody that comes before me and is the defendant in an employment discrimination lawsuit. I just can't do it. That's not my job. The law doesn't say that I should do that. And that essentially would be what I would be doing if I granted an injunction and said come to me prior to taking any disciplinary action, come to me prior to writing any report that may be critical of Mr. Blough, come to me prior to changing what assignments you give him. I mean I don't know where it would end. And I just can't do that.

But, at any rate, the reason I'm denying the motion for preliminary injunction is that you have just not shown any irreparable injury. And I don't believe that you can at this stage. Not to mention the fact that there's also not been a showing of substantial likelihood of prevailing on the merits at this point. But my greater concern is the irreparable injury.

So I'm doing to deny the motion for preliminary injunction, finding that the plaintiff has not met his burden as far as irreparable injury and substantial likelihood of prevailing on the merits. And this case will proceed forward to trial in November.

MR. BLOUGH: Your Honor, can I say something?

THE COURT: Yes, sir.

MR. BLOUGH: My basis for claim is that they violated my Fifth Amendment right to liberty. And that's --I think that the Supreme Court, by the analysis in a recent case, would uphold that.

There's a tradition in this country, and you don't do certain things. And one of the things you don't do is you don't tell a disabled veteran with two artificial legs you are going to push him down a flight of stairs. You have taken away my sense of security. You don't have that right to do that. Nobody has that right. And that's all.

THE COURT: Well -- and I don't disagree that, as I said, that there is an emotional distress. It is just that I don't think there is a legal reason or basis for me to grant an injunction.

MR. BLOUGH: Okay.

THE COURT: So the motion is denied. Thank you. I'll enter a written order.

(Thereupon, these proceedings were adjourned at 9:30 a.m.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

"S/Carol Jacobs" — March 5, 1999
Carol Jacobs — Date

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Melvin E. Blough,

Plaintiff,

v. Case No. 98-1358-CIV-T-24(E)

Robert E. Rubin, Secretary of the Treasury,

Defendant,

MOTION TO AMEND COMPLAINT

On June 29, 1998 Plaintiff did file a Complaint with this Court providing a claim under the Civil Rights Act of 1964 (42 U.S.C 2000e-5, 2000e-16) against Defendant alleging unlawful intentional discrimination which is prohibited under sections 704 and 717 of the Act (42 U.S.C. 2000e-3(a), 2000e-16(a).

The initial claim is considered de novo in that the Defendant failed to bring timely administrative action as provided in 42 U.S.C. 2000e-16(c) and illustrated in Reynolds v. Wise, U.S.D.C., N.D. Tx, 375 F. Supp. 145 (1974).

Plaintiff respectfully requests that the Court grant this request to amend the Complaint of June 29, 1998 to include a claim of action against Defendant for unlawful intentional discrimination based upon Plaintiff's disabilities. This action which is brought under the Rehabilitation Act of 1973, as amended (29 U.S.C. 701, 791, 794(a), 794(d), 794a(a)(1)) and the Americans with Disabilities Act of 1990 (42 U.S.C. 1211, 12112(a), 12112(b), 12117, 12201, 12203) is brought in addition to the initial action against unlawful intentional employment related discrimination under Title VII, sections 704 and 717 of the Civil Rights Act of 1964, as amended.

The allegations and facts in support of the allegations as initially stated in the Complaint apply to this action brought under the Rehabilitation Act of 1973, as amended and the Americans with Disabilities Act of 1990.

Jurisdiction is conferred on the Court by 29 U.S.C. 794a (a)(1) and 42 U.S.C. 12117(a).

In addition to the equitable and other relief sought under 42 U.S.C. 2000e-5(g) in the Complaint of June 29, 1998; Plaintiff requests damages for intentional discrimination in employment as provided under 42 U.S.C. 1981a(a)(1)/(a)(2) and 1981a(b)(2)/(b)(3).

WHEREFORE, Plaintiff respectfully requests that the Court grant this motion to amend the Complaint filed with this Court on June 29, 1998.

"S/ Melvin E. Blough" pro se

Melvin E. Blough
803 Tomahawk Trail

Brandon, FL 33511
(813) 651-2778

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been provided via facsimile (813) 274-6198 and United States certified mail to Assistant United States Attorney Warren Zimmerman (Suite 3200, 400 North Tampa Street, Tampa, FL.) this fifteenth day of March, 1999 in accordance with Federal Rule of Civil Procedure 5.

"S/ Melvin E. Blough" pro se

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Melvin E. Blough,

Plaintiff,

v. Case No. 98-1358-CIV-T-24(E)

Robert E. Rubin, Secretary of the Treasury,

Defendant,

MOTION FOR LEAVE TO FILE MEMORANDUM IN SUPPORT OF MOTION TO AMEND COMPLAINT TO BRING ACTION UNDER THE REHABILITATION ACT OF 1973, AS AMENDED AND THE AMERICANS WITH DISABILITIES ACT OF 1990

This motion for leave to file in support of a motion pending before the Court is filed under the provisions of Local Rule 3.01(b) and does not alter the nature of the request within the pending motion.

Plaintiff did exhaust the administrative remedies provide by the Department of the Treasury (Defendant/Employer):

A. The complaint of employment related discrimination initially filed with the Department

of the Treasury on November 18, 1997 did contain the following statement:

"The discriminatory retaliation by internal revenue service management against me has violated the internal revenue service's own Reasonable Accommodation Policy Statement (P-1-47) which provides that "Executives, managers and supervisors shall create a positive work environment that will encourage employees with disabilities to maximize and reach their full potential".

B. References to threats of physical abuse by Employer/ Defendant and Employee/Plaintiff's disabilities were prominent throughout the initial complaint filed with the Department of the Treasury.

C. The complaint of employment related discrimination initially filed with the Department of the Treasury did include a copy of the December 5, 1996 decision by the U. S. Equal Employment Opportunity Commission which did provide the causal link to the Complaint of retaliation currently before the Court.

Plaintiff has met the "relation back" doctrine under Rule 15(c)(2) of the Federal Rules of Civil Procedure:

A. The Complaint of employment related discrimination filed with this Court on June 29, 1998 did reference the threats of physical abuse by Employer/ Defendant and the physical disabilities of Employee/Plaintiff.

B. The Complaint before this Court also references the December 5, 1996 decision by the U. S. Equal Employment Opportunity Commission

which provides the causal link to the current complaint of retaliation. The initial paragraph of the December 5, 1996 decision by the U. S. Equal Employment Opportunity Commission reads as follows:

"Appellant filed an appeal with this Commission from a final decision of the agency concerning his complaint of unlawful employment discrimination, in violation of section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. sec. 791 et seq "

The 1995 complaint to the Department of the Treasury, which precipitated the December 5, 1996 EEOC decision was also a mixed complaint in that it did complain of Title VII and Rehabilitation Act violations.

WHEREFORE, Plaintiff respectfully requests that the Court grant this motion for leave to file this memorandum in support of the motion to amend complaint to bring action under the Rehabilitation Act of 1973, as amended and the Americans With Disabilities Act of 1990.

"S/ Melvin E. Blough" pro se

Melvin E. Blough
803 Tomahawk Trail
Brandon, FL 33511
(813) 651-2778

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been provided via facsimile (813) 274-6198 and United States certified mail to Assistant United States Attorney Warren Zimmerman (Suite 3200, 400 North Tampa Street, Tampa, FL.) this tenth day of May, 1999 in accordance with Federal Rule of Civil Procedure 5.

"S/ Melvin E. Blough pro se

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Melvin E. Blough,

Plaintiff,

v. Case No. 98-1358-CIV-T-24(E)

Robert E. Rubin, Secretary of the Treasury,

Defendant,

PLAINTIFF'S SECOND MOTION FOR LEAVE TO AMEND COMPLAINT UNDER RULE 15 (a) AND TO PRESENT INITIAL DEMAND FOR JURY TRIAL UNDER RULE 38 (b) OF THE FEDERAL RULES OF CIVIL PROCEDURE

On June 29, 1998 Plaintiff did file a Complaint with this Court providing a claim under the Civil Rights Act of 1964 (42 U.S.C. 2000e-5, 2000e-16) against Defendant alleging unlawful intentional discrimination which is prohibited under sections 704 and 717 of the Act (42 U.S.C. 2000e-3(a), 2000e-16(a)).

Plaintiff respectfully requests that the Court grant this request to amend the initial Complaint to include a claim of action against Defendant for deprivation of a fundamental and protected liberty interest which exists within the Fifth Amendment to the United States Constitution.

Jurisdiction is conferred on the Court by 28 U.S.C. section 1331 in that the basis for this amended claim arises under the Federal Constitution.

Title VII of the Civil Rights Act of 1964 is not the exclusive remedy for Plaintiff in that Section 712 of the Act provides that "nothing contained in this title shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans".

Under the analysis presented by the United States Supreme Court in Washington v. Glucksberg, 117 S. Ct. 2258 (1997) ; a one hundred percent (100%) physically disabled veteran has a fundamental Constitutional right not to be threatened, harassed and retaliated against by the same government which put him in harms way in Viet Nam.

Plaintiff has met the "relation back" doctrine under Rule 15(c)(2) of the Federal Rules of Civil Procedure in that the initial Complaint did reference the fear experienced by Plaintiff and the threats, harassment and retaliation directed to Plaintiff by agents of Defendant since 1991.

"The change in defendants' capacity is not substantial enough to prevent the relation back of the amendment to the date of filing of the original complaint. The basis of plaintiff's claim is that he was illegally discharged. That was the essence of his initial complaint under Title VII and 42 U.S.C. section 1985, and that is the essence of his Fifth Amendment claim now. Certainly an amendment which asserts a claim under a different statute (or under the Constitution instead of a statute) but which arises out of the same conduct relates back to the date of filing of the original

complaint." Tiller v. Atlantic Coast Line R. R. Co., 65 S. Ct. 421 .

The essence of Plaintiff's initial complaint under Title VII is that he has been subject to a continuing series of threats, harassment, intimidation and retaliation as a pretext for adverse action over an eight year period. Said actions are also the basis in this Fifth Amendment claim. As the United States Supreme Court noted in *N. Y. Central & Hudson River R. R. Co. v. Kinney,* ; ther eis much "identity" between Title VII and Fifth Amendment claims.

Rules 15 of the Federal Rules of Civil Procedure provides that a party may amend a pleading only by leave of the court and leave shall be freely given when justice so requires. The right of trial by jury is provided by the Seventh Amendment to the Constitution.

WHEREFORE, Plaintiff respectfully requests that the Court grant this motion for leave to file a pleading to amend the Complaint to bring action under the Fifth Amendment and to present Demand For Jury Trial.

"S/ Melvin E. Blough" pro se

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803 Tomahawk Trail
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(813) 651-3158

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been provided via facsimile (813) 274-6198 and certified mail to Assistant United States Attorney Warren Zimmerman this ninth day of August, 1999 in accordance with Federal Rule of Civil Procedure 5.

"S/ Melvin E. Blough" pro se

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MELVIN E. BLOUGH,

Plaintiff,

v. Case No. 98-1358-CIV-T-24(E)

ROBERT E. Rubin, Secretary, U.S. Department of the Treasury,

Defendant.

DEFENDANT'S RESPONSE TO PLAINTIFF'S SECOND MOTION FOR LEAVE TO AMEND COMPLAINT AND TO PRESENT INITIAL DEMAND FOR JURY TRIAL, WITH MEMORANDUM OF LAW

Defendant, Robert E. Rubin, Secretary of the Treasury, by and through the undersigned Assistant United States Attorney, hereby opposes plaintiff's second motion for leave to amend complaint and to present initial demand for jury trial (Doc. 97). In support hereof, defendant respectfully presents the following:

MEMORANDUM OF LAW

Plaintiff filed this action against the Secretary of the Treasury pursuant to Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991. The complaint alleges employment discrimination based on reprisal for prior involvement in the protected Equal Employment Opportunity

("EEO") process. Specifically, plaintiff asserts he was retaliated against by management's alleged refusal to permit him to audit tax exempt organizations meeting the criteria for examination under the so-called coordinated examination program ("CEP") of the Internal Revenue Service.*

Plaintiff moved for leave to amend his complaint on or about March 15, 1999 (Doc. 33) seeking to add claims of handicap discrimination under the Rehabilitation Act of 1973, 29 U.S.C. section 794. Defendant opposed that motion, urging that, absent some demonstration by plaintiff that he had exhausted administrative remedies with respect to claims of handicap discrimination, plaintiff should not be permitted to delay the proceedings. Plaintiff's first motion for leave to amend remains pending.

In his second motion for leave to amend, plaintiff apparently seeks to add one or more constitutional tort claims, alleging deprivation of his right to due process of law under the Fifth Amendment. Plaintiff incorrectly suggests that Title VII claims and Fifth Amendment claims present some sort of identity of issues, such that the relation back doctrine of Fed. R. Civ. P. 15 would treat his constitutional claims as having been timely filed on the date of the original complaint. Whatever merit such an argument might

*Defendant's characterization of the complaint draws substantially upon plaintiff's deposition testimony, as summarized in defendant's motion for summary judgment (Doc. 75). The complaint itself is very general, but is clearly limited on its face to one or more claims of reprisal.

have in a lawsuit against a private or municipal employer, it has none in this case against the Secretary of the Treasury. The only proper party to a Title VII action or handicap discrimination claim against a federal employer is the head of the agency in question. See 42 U.S.C. section 2000e-16(c) (Title VII); 29 U.S.C. section 794a (incorporation Title VII procedures and remedies in Rehabilitation Act claims). With respect to the types of employment discrimination described therein, these statutes constitute the exclusive remedies for employment discrimination in the federal workplace. See Brown v. General Services Administration, 425 U.S. 820, 828 834 (1976). In contrast, constitutional tort claims may not be filed against federal agencies. F.D.I.C. v. Meyer, 510 U.S. 471, 483-86 (1994). Such claims, if available at all, lie against individual federal employees. Since the claims which plaintiff now seeks to add would be against different parties defendant than the claims presently before the court, the doctrine of relation back is unavailing to plaintiff. Where plaintiff has not even purported to identify or serve the putative defendants in his constitutional tort claims, thereby giving them an opportunity to be heard on his motion, he should not be heard to delay these proceedings with an amended complaint. Rather, he should be put to his burden to respond to defendant's motion for summary judgment.

Insofar as plaintiff wishes to demand jury trial for the first time with respect to his original complaint, rather than with respect to the constitutional tort claim that he now seeks leave to file, his motion should be denied in that respect also. Under Rule 38(d), plaintiff's failure to demand jury trial in the complaint or within ten days of the final pleading directed thereto constitutes a waiver of the right to jury trial. The case management report also reflects that this case will involve a nonjury trial. Plaintiff has

failed to show cause why he should now be permitted to retract that waiver and has not addressed the issue in a memorandum of law.

WHEREFORE, defendant respectfully requests that defendant's second motion for leave to amend complaint and to present initial demand for jury trial be denied.

This the 23d day of August, 1999.

Respectfully submitted,

CHARLES R. WILSON
UNITED STATES ATTORNEY

"S/Warren A. Zimmerman"
By: Warren A. Zimmerman
Assistant United States Attorney
Chief, Civil Division, Room 3200
400 North Tampa Street
Tampa, FL 33602
Telephone: (813) 274-6335
Facsimile: (813) 274-6198
Florida Bar No. 652040

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the the original and a true and correct copy of the foregoing has been furnished by U.S. Mail, postage prepaid, this 23d day of August, 1999, to the following:

Melvin Blough
803 Tomahawk Trail
Brandon, FL 33511

"S/Warren A. Zimmerman"

WARREN A. ZIMMERMAN
Assistant United States Attorney
Chief, Civil Division

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MELVIN E. BLOUGH,

Plaintiff,

v. :Case No. 98-1358-C.V.-T-24(E)

ROBERT E. RUBIN,
Secretary of the Treasury,

Defendant.

_____/

ORDER

This cause comes before the Court on plaintiff's Motion for Leave to File Memorandum in Support of Motion to Amend Complaint. (Doc. No. 49). Defendant has responded to plaintiff's original Motion to Amend Complaint. (Doc. No. 36).

Upon consideration, it is ORDERED AND ADJUDGED that, plaintiff's Motion for Leave to File Memorandum in Support of Motion to Amend Complaint (Doc. No. 49) is GRANTED IN PART to the extent that plaintiff shall file a supporting memorandum with the Court on or before September 10, 1999.

DONE AND ORDERED at Tampa, Florida, this 30TH day of August, 1999.

"S/Susan C. Bucklew"

SUSAN C. BUCKLEW
United States District Judge

Copies to:

Counsel of Record
Courtroom Deputy

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Melvin E. Blough,

Plaintiff,

v. Case No. 98-1358-CIV-T-24(E)

Robert E. Rubin, Secretary of the Treasury,

Defendant,

MOTION FOR LEAVE TO FILE MEMORANDUM OF LAW IN SUPPORT OF SECOND MOTION TO AMEND COMPLAINT UNDER RULE 15(a) FEDERAL RULES CIVIL PROCEDURE

This motion for leave to file in support of a motion pending before the Court is filed under the provisions of Local Rule 3.01(b).

MEMORANDUM OF LAW

This claim of constitutional tort against the United States is not brought under the Federal Tort Claims

Act for personal injury caused by an wrongful act of any employee of the Government while acting within the scope (or outside the scope) of his office or employment.

This Complaint of constitutionally based discrimination is deemed to be the conduct of the sovereign and not the conduct of its agents.

Internal Revenue Service management persons (Prowler, Cox, Breslin, Clark, Rachael, Rodrigueq, etc.) did perform their assigned duties within the abusive management culture of the Internal Revenue Service which not only condoned; but also rewarded the threats, intimidation, harassment and retaliation which Plaintiff was subject to over a eight year period. Liability/responsibility for said abuse rests with the Defendant, not the individuals.

The abusive management culture which did exist within the Internal Revenue Service is best described in the September 10 and 25, 1997 Hearings before the Subcommittee on the Civil Service of the Committee on Government Reform and Oversight House of Representative and nine days of testimony during the 1998 Hearings before the Committee on Finance United States Senate.

As the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some act of Congress, or the court cannot exercise jurisdiction over it. U.S. v. Clarke, 8 Pet. 436, 444.

The doctrine that the United States cannot be sued as a party defendant in any court whatever, except where congress has provided for such suit, examined and reaffirmed, and the nature of this exemption considered. United States v. Lee, 1 S. Ct. 240 (1882).

The constitutional provisions that no person shall be deprived of life, liberty, or property without due process of law, nor private property taken for public use without just compensation, are intended as limitations upon the power of the government in dealing with the citizens, and relate to that class of rights whose protection is peculiarly within the province of the judicial branch of the government. U.S v. Lee, supra.

The evils which it is suggested may arise from interference of state or other courts with the exercise of powers essential to government, are illusory, and are insignificant in comparison with the proposition that no relief can be granted when it is asserted that the United States has authorized the wrong. U.S. v. Lee, supra.

It is not a textual problem, for Congress has not expressed its will in words. Congress may not even have had any consciousness of intention. The Congressional will must be divined, and by a process of interpretation which, in effect, is the ascertainment of policy immanent not merely in the single statute from which flow the rights and responsibilities of Regional, but in a series of statutes. Keifer & Keifer v. Reconstruction Finance Corp., 59 S. Ct. (1939).

Section 712 of Title VII of the Civil Rights Act of 1964 (USC Title 42, Chapter 21, Subchapter VI, section 2000e-11) provides that Title VII is not the exclusive remedy to Plaintiff who has been recognized by Defendant as a one-hundred percent (100%) disabled veteran. Section 712 of Title VII was not referenced in Brown v. General Service Administration, 96 S. Ct. 1961 (1976) and therefore was not a fact in consideration by the Court.

The United States Government (sovereign) has acknowledged responsibility and liability for the service connected disabilities of Plaintiff/Veteran.

Congress has via a series of statutes expressed its will to waive the Governments sovereign immunity relative to Plaintiff's Complaint of constitutionally based discrimination. In addition to the waiver afforded qualified veterans and non-veterans under Title VII of the Civil Rights Act of 1964 and the Rehabilitation Act of 1973; Congress has afforded Plaintiff and other qualified veterans special rights and preferences under Federal Statutes based upon the extent of the disabilities incurred by the respective veteran:

1. Federal Statute on Veterans Preference (Title 5 U.S.C. , section 2108 et. seq.).

2. Employment and Training of Veterans (Title 38 U.S.C., section 4211 et. seq.).

3. Vietnam Era Veterans' Readjustment Act (Title 38 U.S.C. section 4211, et. seq.) which provides a waiver of sovereign immunity by Congress in that section 4214(c) states an express private course of action for disabled veterans alleging discrimination by the Federal Government.

4. Uniform Services Employment and Reemployment Rights Act (Title 38 U.S.C. section 4301 et. seq.) which addresses discrimination of veterans as employees of the Federal Government and provides waiver of sovereign immunity by Congress in that the decision of the Merit System Protection Board maybe appealed to the United States Court of Appeals for the Federal Circuit (Title 38, Chapter 43, section 4324(d)(1)).

The fundamental constitutional right as stated by Plaintiff in Plaintiff's second motion for leave to amend complaint is deemed actionable within this Court.

The constitution clearly creates rights and imposes obligations different from any which exist at common law in the absence of statute. Smith v. Cremins, 308 F. 2d. 187 (9th Cir. 1962).

The central purpose of the Equal Protection Clause of the Fourteenth amendment is the prevention of official conduct discriminating on the basis of race. It is also true that the Due Process clause of the Fifth amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups. Bolling v. Sharpe, 74 S. Ct. 693, (1954).

We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today. Washington v. Davis, 96 S. Ct. 2040 (1976).

The United States of America is also made a party to this Complaint as amended.

The change in defendant's capacity is not substantial enough to prevent the relation back to the date of filing of the original complaint. De Malherbe v. Intern U. of Elevator Constructors, 449 F. Supp. 1335 (1978).

Money damages of ten million dollars ($10,000,000) are sought from the Defendant to redress constitutionally based discrimination directed to Plaintiff.

Plaintiff's request for jury trial under Rule 38(b) of the Federal Rules of Civil Procedure is withdrawn as the request has been modified and presented to the Court as a concurrent motion.

WHEREFORE, Plaintiff respectfully requests that the Court grant this motion for leave to file this memorandum in support of Plaintiff's second motion to amend Complaint under Rule 15(a) of the Federal Rules of Civil Procedure.

"S/ Melvin E. Blough" pro se

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803 Tomahawk Trail
Brandon, FL 33511
(813) 651-3158

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been provided via facsimile (813) 274-6198 and certified mail to Assistant United States Attorney Warren Zimmerman this seventh day of September, 1999 in accordance with Federal Rule of Civil Procedure 5.

"S/ Melvin E. Blough" pro se

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Melvin E. Blough,

Plaintiff,

v. Case No. 98-1358-CIV-T-24(E)

Robert E. Rubin, Secretary of the Treasury,

Defendant,

MEMORANDUM IN SUPPORT OF MOTION TO AMEND COMPLAINT TO BRING ACTION UNDER THE REHABILITATION ACT OF 1973, AS AMENDED AND THE AMERICANS WITH DISABILITIES ACT OF 1990

This memorandum was authorized by Court Order of August 30, 1999.

The pending amendment to the Complaint of discrimination filed with this Court on June 29, 1998

is not a claim of discrimination against the handicapped Plaintiff which occurred in 1997, but is a claim of prohibited retaliation directed to handicapped Plaintiff in 1997 in response to the prior exercise by Plaintiff of protected activities which occurred in 1993 and 1995.

The purpose in this memorandum is to supplement Doc. No. 33 and Doc. No. 49 which are within the Court record. Exhibits B and F (pages 3 and 4 of the May 25, 1999 deposition) of Doc. No. 89 provide documentation and discussion of the basis for this claim.

This action is requested in addition to and not to the exclusion of Plaintiff's claims of action under Title VII of the Civil Rights Act of 1964 and the claim for deprivation of a fundamental and protected liberty interest which exists within the Fifth Amendment to the United States Constitution.

WHEREFORE, Plaintiff respectfully requests that the Court grant this motion to amend the Complaint to include action under the Rehabilitation Act of 1973, as amended and those sections of the Americans With Disabilities Act of 1990 which were referenced in the original motion to amend.

"S/ Melvin E. Blough" pro se

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been provided via certified mail to Assistant United States Attorney Warren Zimmerman this tenth day of September, 1999 in accordance with Federal Rule of Civil Procedure 5.

"S/ Melvin E. Blough" pro se

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Melvin E. Blough,

Plaintiff,

v. Case No. 98-1358-CIV-T-24(E)

Robert E. Rubin, Secretary of the Treasury,

Defendant,

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, WITH MEMORANDUM OF LAW

Plaintiff moves for denial of Defendant's motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure based upon the following considerations:

1. Plaintiff has established a prima facie case of reprisal such as to warrant full trial consideration as to the claim of employment related discrimination under Title VII of the Civil Rights Act of 1964.

2. Defendant has failed to properly state the legal questions presented in this Complaint of discrimination and has also failed to demonstrate that the facts underlying said misguided legal questions are not in dispute. Defendant has therefore failed to properly support his motion for summary judgment.

3. Summary judgment must be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition. A motion under Rule 37(b)(2) of the Federal Rules of Civil Procedures is currently before this Court.

4. Two motions are pending before the Court to amend the initial Complaint of employment related discrimination under Title VII of the Civil Rights Act of 1964. The facts presented in this Complaint are so egregious such as to violate multiple statutes and the Constitution itself. It would be inappropriate for the Court to consider this motion for summary judgment which is limited to a single claim within a multi-facet Complaint.

In support hereof, Plaintiff respectfully presents the following:

MEMORANDUM OF LAW IN SUPPORT OF PRIMA FACIE CASE OF REPRISAL

Defendant' arguments is support of summary judgment to Plaintiff's action under Title VII of the Civil Rights Act of 1964:

"Defendant's is entitled to judgment as a matter of law, because plaintiff cannot establish a prima facie

case of reprisal. Plaintiff cannot do so for at least two reasons: First, he cannot point to any *similarly situated employees* who have received better treatment; second; he cannot establish an *'adverse employment action'* or even a composite of employment conditions which, though short of adverse action, meet the test of 'substantiality' so as to constitute actionable reprisal under other circumstances. Even if plaintiff were deemed to have made out a prima facie case, defendant would be entitled to judgment as a matter of law under the *undisputed facts* of record."

1. **Defendant has incorrectly defined "similarly situated employees"relative to the Title VII Complaint before this Court:**

Defendant's argument: "To establish a prima facie case of discrimination under Title VII, 'plaintiff must show that his employer treated similarly situated employees outside his classification more favorably than [him]self.' Holifield v. Reno, 115 F. 3d 1555, 1562 (11th Cir. 1997). To be similarly situated, comparative employees must be similarly situated in all relevant aspects of employment. Id. 'If a plaintiff fails to show the existence of a similarly situated employee, summary judgment is appropriate where no other evidence of discrimination is present.' Id.

In order to identify a 'similarly situated' employee plaintiff would have to identify a qualified EO agent who, like plaintiff, was within Florida but not assigned to Prowler's group. In order to establish that such an employee was outside plaintiff's 'class', plaintiff would have to show that the employee had no history of EEO activity of which management was aware. Proof that such an employee was permitted to work CEP cases in

Florida in derogation of the policy of that all such cases be supervised by Prowler would then satisfy the first prong of the required prima facie case."

Plaintiff's objections: Defendant has narrowly defined the phrase "similarly situated employees" such that it does not meet the relevant legal standards and creates an illusionary employee beyond Plaintiff and similarly situated employees.

Under *McDonnell Douglas,* a plaintiff establishes a prima facie case of race discrimination under Title VII by showing ..... (3) his employer treated similarly situated employees outside his classification more favorably. Holifield v. Reno, 115 F.3d 1555 (11th Cir.1997).

To make a comparison of the plaintiff's treatment to that of non-minority employees, the plaintiff must show that he and the employees are similarly situated in all relevant respects. Id.

In determining whether employees are similarly situated for purposes of establishing a prima facie case, it is necessary to consider whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways. Id.

In sum, the elements of a prima facie case vary with the circumstances of the alleged discrimination. Jonesv. Frank, 973 F.2d 673 (8th Cir. 1992).

In the litany of cases which reference or define "similarly situated" employees (*McDonnell Douglas Corp./Smith v. Monsanto Chemical Co./Williams v.Ford Motor Co./Holifield v. Reno, etc.)* the employees conduct was deemed the

defining factor relevant to the determination of "similarly situated" status.

In the case at point, Plaintiff's employment conduct and qualifications are exceptional and without question. Please refer to exhibit A (Doc. No. 89*) which reflects Plaintiff's annual evaluations and performance awards from February 1, 1988 to February 28, 1998. Plaintiff has never been the subject of disciplinary action.

It is Defendant/employer's conduct which is the subject of this Complaint. Please refer to exhibit B (Doc. No. 89) which reflects upon the 1993, 1995 and 1997 EEO Complaints of threats, religious discrimination, harassment and retaliation by Defendant/employer against Plaintiff/employee. Also refer to exhibit C (Doc. No. 89) which provides the depositions of Gary Maxwell (pages 16, 17, 69-73) and Genny Farley (pages 13, 14) attesting to the September 23, 1991 and September 21, 1995 threats of physical injury to Plaintiff by Ron Prowler.

* The exhibits referenced within the Motion were initially presented with Plaintiff's Motion to continue under Rule 56(f) in response to this motion for summary judgment (Document Number 89 per Docket Sheet). It would serve no useful purpose to duplicate the two volumes of exhibits and resubmit at this time. Reference will be made to Doc. No. 89 when appropriate.

It is the legal position of Plaintiff that the standard position description of Plaintiff (as developed by the Office of Personnel Management) provides the relevant employment criteria upon which "similarly situated" employees who wish to conduct examinations of

the largest and most complex entities are properly identified. Please refer to exhibit D (Doc. No. 89) which provides a copy of Plaintiff's Standard Position Description which has remained unchanged since March 27, 1989.

The fact that said similarly situated employees were and continue to be assigned to Ron Prowler's coordinated examination program group is relevant to Plaintiff's claim of disparate treatment via retaliation. Please refer to exhibit E (Doc. No. 89) which provides a listing of EO agents assigned to Ron Prowler's group October 1, 1997 through June 29, 1998. It is these employees with which Plaintiff would have competed absent the threats of physical injury by Ron Prowler. The confirmation that all such employees are outside of Plaintiff's protected group is pending compliance of the Rule 37(b)(2) motion currently before this Court.

The following motions to compel currently before the Court will reflect upon the truth and relevance of this matter:

1. Initial motion to compel production of documents (item 5).

2. Motion to compel third production of documents (item 4).

2. **Defendant's conduct does meet the standard for adverseemployment action:**

Defendant's argument: "Against the backdrop of

this case law, plaintiff's claims clearly fail to allege an employment action that can be characterized as 'adverse'. Plaintiff's mere disagreement with internal revenue service management's decision to assign him one type of GS-13 case versus another type of GS-13 case does not transform that decision into an adverse employment action."

Plaintiff's objections:

Relevant case law – "Titl eVII of the Civil Rights Act of 1964 provides that it is unlawful for an employer 'to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin.' The plaintiff may establish a prima facie case of discrimination under Title VII ..... on the basis of direct evidence of discrimination, which consists of 'evidence which, if believed, would prove the existence of discrimination without inference or presumption'". Holifield v. Reno, 115 F.3d 1555 (11th Cir. 1997).

Substantive law will identify which facts are material for purposes of summary judgment, as only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment; factual disputes that are irrelevant or unnecessary will not be counted. Anderson v. Liberty Lobby, Inc., 106S. Ct. 2505 (1986).

"Second, the district court improperly rejected the claim of appellant Bernice Huffman that she was 'demoted' to an inferior job title and duties (although with the same salary) because she was

a female. The court was mistaken in assuming that this claim was not cognizable under Title VII. The former Fifth Circuit held in *Swint v. Pullman Standard,* 539 F.2d 77, 89 (5th Cir. 1976), that 'a Title VII plaintiff does not have to show economic loss to prove discrimination.' Job titles and duties themselves are conditions of employment protected by Title VII. Cox v. American Cast Iron Pipe Co., 784 F.2d 1546 (11th Cir. 1986).

"Less Desirable Assignments – Prim aFacie Case.

Plaintiffs in successful Title VII cases have uniformly been able to establish that their assignments produced diminished wages. When today's proof was ruled insufficient to demonstrate loss, a novel question was squarely presented. To resolve it requires resort to the statutory language and case analysis of legislative purpose. When this path of reasoning is followed it leads to the conclusion that a Title VII plaintiff does not have to show economic loss to prove discrimination." Swint v. Pullman-Standard, 539 F.2d 77(1976).

"To be actionable under Title VII as 'abusive work environment' harassment, conduct need not seriously affect employee's psychological well -being or lead employee to suffer injury, so long as environment would reasonably be perceived, and is perceived, as hostile or abusive; focusing on employee's psychological well-being or whether employee suffered injury could unnecessarily focus fact finder's attention on concrete psychological harm, which Title VII does not require." Harrisv. Forklift Systems, Inc.,114 S. Ct. 367 (1993).

When employee proves that tangible employment

action resulted from refusal to submit to supervisor's sexual demands, he or she establishes that employment decision itself constitutes change in terms and conditions of employment that is actionable under Title VII; however, ... conduct must be severe or pervasive. Burlington Industries v.Ellerth, 118 S. Ct. 2257 (1998).

Tangible employment action taken by supervisor becomes for Title VII purposes the act of employer. Id.

Employer has no affirmative defense to vicarious liability for supervisor's harassing conduct in violation of Title VII when supervisor's harassment culminates in tangible employment action, such as discharge, demotion, or undesirable reassignment. Id.

A prima facie case of employment discrimination raises an inference of discrimination only because those acts are presumed, if otherwise unexplained, to be more likely than not based on consideration of impermissible factors. Furnco Const. Corp. v. Waters, 98 S. Ct. 2943 (1978).

Once prima facie case of employment discrimination has been made out, burden which shifts to employer is merely that of proving that it based employment decisions on legitimate consideration and not on illegitimate one such as race; to prove that, it need not prove that it pursued course which would both enable it to achieve its own business goal and allow it to consider most employment applications, but need only articulate some legitimate nondiscriminatory reason for applicant's rejection. Id.

To establish causal relation element of prima facie case of retaliation under Title VII, plaintiff need only show that the protected activity and the adverse action are not wholly unrelated. Wideman v. Wal-MartStores, Inc., 141 F.3d 1453 (11th Cir. 1998).

"Other evidence that may be relevant, depending on the circumstances, could include facts that petitioner had discriminated against respondent when he was an employee or followed a discriminatory policy toward Minority employees." McDonnell Douglas Corporation v. Green, 93 S.Ct. 1817 (1973).

In deciding whether employer's violations of Title VII are of a continuous nature for limitations purposes, court must distinguish between present consequences of one-time violation, which does not extend limitations period, and continuation of violation into present, which does. Beavers v. American Cast Iron Pipe Co., 975 F.2d. 792 (11th Cir. 1992).

"Serial Violations. What, then, is meant by the term 'continuing violation'? In one incarnation, the theory recognizes that some acts are imbricated, i.e. they involve an interlinked succession of related events or a fully-integrated course of conduct. Although the limitations clock generally starts with the commission of a discriminatory act, a true 'continuing violation' rewinds the clock for each discriminatory episode along the way. Thus, if the later violations in the series are within the prescriptive period, an employee may pursue them despite the fact that earlier acts, forming part and parcel of the same pattern, have grown stale." Mack v. Great

Atlantic and Pacific Tea Co., Inc.,871 F.2d 179 (1st Cir. 1989).

For purpose of evaluating sufficiency of plaintiff's case against defendant to withstand motion for summary judgment, allegations about conspiracy to boycott plaintiff were to be taken both as true and as legally sufficient. First Nat. Bank of Ariz. V. Cities Service Co., 88 S. Ct. 1575 (1968).

Issue of material fact required by summary judgment rule to be present to entitle party to proceed to trial is not required to be resolved conclusively in favor of party asserting its existence; rather, all that is required is that sufficient evidence supporting claimed factual dispute be shown to require jury or judge to resolve parties' differing versions of truth at trial. Id.

"In 1972 Congress extended the protection of Title VII of the Civil Rights Act of 1964 to employees of the Federal Government. A principal goal of the amending legislation was to eradicate 'entrenched discrimination in the Federal service,' *Morton v. Mancari,* 94 S. Ct. 2474, by strengthening internal safeguards and by according 'aggrieved federal employees or applicants ..... the full rights available in the courts as are granted to individuals in the private sector under title VII." Chandler v. Roudebush, 96 S. Ct. 1949 (1976).

Title 5, Chapter 23, section 2302 United States Code:

Prohibited personnel practices

(a)(1) For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b) of this section.

(2) For the purpose of this section –

(A) "personnel action" means –

(xi) any other significant change in duties, responsibilities, or working conditions.

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority –

(1) discriminate for or against any employee or applicant for employment –

(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);

(D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791);

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of –

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;

(11) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.

Employee's transfer to induce his resignation because he was considered undesirable employee was an "adverse action" and entitled employee to a hearing even if it entailed no reduction in rank. Motto v.General Services Administration of U.S., 335 F. Supp. 694 (1971).

Employee may be given fair choice between facing charges or resigning but decision to rid government of employee without complying with statute may not be camouflaged as discretionary decision. Id.

Transfer, like other government action affecting employee's status, may not be based on arbitrary decision to achieve predetermined result. Id.

Government agency is not required to provide life long employment on his own terms to employee who does not do satisfactory job but supervisor may not be permitted to make his own subjective determination that employee is undesirable and achieve that person's separation from service by actions designed to force his resignation. Id.

A. Plaintiff's argument: Against the backdrop of this case law; this complaint addresses eight years of threats, harassment, intimidation, discrimination and retaliation as a pretext for adverse action. Exhibits B and F (Doc. No.89) provide a narrative

of the serial violations of Plaintiff's civil rights over the eight year period.

The Complaint currently before this Court does not reflect upon a "mere disagreement with internal revenue service management's decision to assign Plaintiff one type of GS-13 case versus another type of GS-13 case", but rather an historically abusive and hostile work environment.

"To establish a prima facie case of retaliation, the plaintiff must show: (1) that he engaged in statutorily protected expression; (2) that he suffered an adverse employment action; and (3) that there is some causal relationship between the two events." Holifield v. Reno, 115 F.3d. 1555 (11th Cir. 1997).

"Once the plaintiff establishes his prima facie case, the employer must proffer a legitimate, non -discriminatory reason for the adverse employment action. If the employer offers legitimate reasons for the employment action, the plaintiff must demonstrate that the employer's proffered explanation is a pretext for retaliation." Id.

Retaliation factor # 1: Refer to Exhibit B (Doc. No. 89) (EEO Complaints filed by Plaintiff).

Retaliation factor # 2: Refer to documentation Exhibit G (Doc. No. 89). Defendant changed a term or condition of Plaintiff's employment which provided a pretext for adverse action. Plaintiff's position description states that he conducts examinations of the largest and most complex tax -exempt organizations.

Effective with the appointment of Ron Prowler as

CEP manager, Plaintiff was limited to the examination of the lowest priority and smallest tax -exempt organizations. Plaintiff was not only denied the opportunity to conduct examinations of CEP qualified entities, but was also denied the opportunity to examine "Code 8 and Code 9" identified entities. Plaintiff has been subject to an adverse change in a term or condition of Plaintiff's employment.

Retaliation factor # 3: The causal link between the EEO Complaints and adverse employment action is complete with Ron Prowler and the knowledge/actions of decision makers Pat Cox and Peter Breslin. Threats of physical injury to Plaintiff by Ron Prowler were the basis for the 1993 and 1995 EEO Complaints filed by Plaintiff. Plaintiff was required to work for Ron Prowler if he wished to conduct examinations of the largest and most complex tax-exempt organizations effective October 1, 1997. It is for this reason that Plaintiff initiated the Complaint.

Defendant had actual knowledge that Plaintiff had been and was currently engaged in protected activities when Defendant retaliated against Plaintiff.

The decision to take the adverse action against Plaintiff was made by decision makers Pat Cox (Chief, EP/EO Division) and Peter Breslin (Assistant Chief, EP/EO Division). Both individuals were fully aware of Plaintiff's prior and current EEO activity.

Management has chosen to retaliate against Plaintiff at the expense of tax compliance in that there are "more CEP entities in Florida that we can do in the next 100 years" per Division Chief

Pat Cox.

The Internal Revenue Manual provides that CEP qualified entities may be excluded from the CEP examination program for any reason. Division Chief Pat Cox believes the exclusion process to be cumbersome and therefore no requests for exclusion were submitted. See Exhibit G (Doc. No. 89).

Division Chief, Pat Cox is unable to proffer a legitimate, non-discriminatory reason for the adverse employment action.

The following motions to compel currently before the Court will reflect upon this matter:

1. Third motion to compel production of documents (items 2, 4, 6).

2. Fifth motion to compel production of documents (item 7).

It is important for the Court to recognize that although the actual act of retaliation in 1997 was not of itself "ugly" (although intentional), the act was preceded and precipitated by a continuos series of related actions (threats, intimidation and harassment) which were in themselves "ugly" and representative of the abusive management culture which exists within the Internal Revenue Service. Said recognition is fact intensive and therefore worthy of full review upon trial.

The statement of legal issues as presented by Defendant on page five of the motion for summary judgment is a misrepresentation to the Court given the following facts which were confirmed during the discovery process:

1. Ron Prowler did threaten Plaintiff with physical harm on multiple occasions over an eight year period.

2. Internal Revenue Service management was advised of the threats directly by Plaintiff and via third-parties (i.e. IRS Inspections, National Union local President, Group Manager Genny Farley).

3. Internal Revenue Service management did promote and protect Ron Prowler and did concurrently harass, intimidate and retaliate against Plaintiff such as to constitute a continuous violation over an eight (8) year period.

The "ultimate question" in a disparate treatment case is not whether the plaintiff established a prima facie case or demonstrated pretext, but whether the defendant intentionally discriminated against the Plaintiff. United States Postal Service Board of Governors v. Aikens, 103 S. Ct. 1478 (1983).

DEFENDANT HAS FAILED TO PROPERLY SUPPORT THE MOTION FOR SUMMAY JUDGMENT

The party opposing a motion for summary judgment need not respond to it with any affidavits or other evidence unless and until the movant has properly supported the motion with sufficient evidence. Adickes v. S.H.Kress & Co. 90 S. Ct. 1598 (1970).

The moving party must demonstrate that the facts underlying all the relevant legal questions raised by the pleadings or otherwise are not in dispute, or else summary judgment will be denied notwithstanding

that the non-moving party has introduced no evidence whatsoever. City of Delray Beach, Fla. v. Agricultural Ins. 85 F.3d. 1527 (11th Cir. 1996).

The CASE MANAGEMENT AND SCHEDULING ORDER as presented by the Court December 29, 1998 did provide that "unless the parties are in full agreement as to the undisputed facts, the movant shall file a separate Statement of Undisputed Facts, with citations to the record, which shall accompany the motion for summary judgment". No such Statement was provided by Defendant.

The following factual representations by Defendant are disputed by Plaintiff:

1) Page 1 of Defendant's Motion For Summary Judgment.

   Factual inference by Defendant:
   Misstatement by Defendant as to form of retaliation by Defendant against Plaintiff.

   "Specifically, plaintiff asserts he was retaliated against by management's alleged refusal to permit him to audit tax exempt organizations meeting the criteria for examination under the so-called coordinated examination program ("CEP") of the Internal Revenue Service.

   Plaintiff's objection: The retaliation by Defendant was initiated in two forms:

   A) Plaintiff was required to work for Ron Prowler to conduct examinations of the largest and most complicated

examinations in accordance with his Standard Position Description. Said examinations were identified within the coordinated examination program universe.

B) Plaintiff was restricted to the examination of the smallest and least complicate examinations within his grade classification. Plaintiff was not permitted to conduct examinations of Code 8 (gross receipts $10,000,000 to $50,000,000) or Code 9 (gross receipts in excess $50,000,000) tax returns; and was in fact limited to the examination of tax returns with less than $5,000,000 in gross receipts. Division Chief Pat Cox did state during his deposition that "I am not sure that $5 million even qualifies as grade 13 case (work), quite candidly". (Doc. No. 89 exhibit G page 60).

2) Page 2 of Defendant's Motion For Summary Judgment.

Factual inference by Defendant: On September 23, 1991, Prowler confronted plaintiff face-to-face and addressed him in a belligerent manner. ..... Plaintiff refrained from formally complaining about Prowler's behavior for more than two years.

Plaintiff's objection: Prowler did threaten Plaintiff with physical injury on September 23, 1991 as confirmed in the sworn deposition of Gary Maxwell (Doc. No. 89 exhibit C page 16).

The Chief, EP/EO Division and President employees Union were immediately notified of the threat against Plaintiff (Doc. No. 89 exhibit B memorandum dated September 23, 1991).

3) Page 4 of Defendant's Motion For Summary Judgment.

Factual inference by Defendant: There is no evidence that Prowler thought he could get away with injuring plaintiff or otherwise intended to harm plaintiff physically.

Plaintiff's objection: Cannot prove a thought existed and failure to act does not prove that intent did not exist.

4) Page 4 of Defendant's Motion For Summary Judgment.

Factual inference by Defendant: Plaintiff did make an administrative claim of employment discrimination under the Rehabilitation Act as a result of this alleged threat.

Plaintiff's objection: Administrative claim did include the Rehabilitation Act and Title VII of the Civil Rights Act of 1964, as amended.

5) Page 4 of Defendant's Motion For Summary Judgment:

Factual inference by Defendant: Cox acted without discriminatory or retaliatory intent in taking the foregoing actions.

Plaintiff's objection: The administrative acts referenced do not relate to; however are being presented is an effort to justify retaliatory conduct on behalf of Defendant.

Affidavit of Pat Cox submitted as exhibit A (paragraph 9) attached to Defendant's Motion For Summary Judgment. "At all times I have honored Mr. Blough's request not to be supervised by Ron Prowler".

It is well documented that Cox was aware that Plaintiff wished to work coordinated examination program cases in accordance with his Standard Position Description (Doc. No. 89 exhibit G); however required Plaintiff to work for Prowler if he wished to conduct examinations of coordinated examination program qualified entities. Plaintiff did present a viable alternative; however Cox now deems the process to be administratively "cumbersome" without further comment as to difficulty involved in a process which was never attempted throughout the EP/EO Division Southeast Region.

It has been established that Pat Cox as Division Chief and other management persons under his control did restrict Plaintiff's work assignment's to the smallest and least challenging subsequent to the appointment of Ron Prowler as manager of coordinated examination program cases in Florida. It has been acknowledged by Defendant that during the nine year period preceding the appointment of Ron Prowler to said management position; Plaintiff did devote substantially all his time to the conduct of coordinated examination program qualified

entities (annual gross receipts $400 million to $1 billion). Plaintiff's performance during this period was rated as excellent (Doc. No. 89 exhibit A). It is difficult to imagine a more blatant example of retaliation.

6) Page 5 of Defendant's Motion For Summary Judgment.

Factural inference by Defendant: Not being a member of Prowler's Group 7214, plaintiff does not work CEP cases in Florida, which are exclusively supervised by Prowler.

Plaintiff's objection: Statement is not true. On March 8, 1999 (fourteen months after filing EEO Complaint and eight months after initiating action for discrimination in this Court) Plaintiff was assigned the examination of a coordinated examination program entity under the regular examination program. It will be proven upon trial that the size and complexity of the initial review of the case file would reflect CEP qualified status to even the least informed.

7. Page 10 of Defendant's Motion For Summary Judgment.

"Question by Defendant: Do you know whether those people who do perform CEP exams under Mr. Prowler's supervision since 10/1/97 have a history of filing EEO complaints or not?

Response by Plaintiff: I don't know.

Factual inference by Defendant: In light of plaintiff's own testimony nullifying the

existence of any similarly situated employee outside his class who received disparate treatment, summary judgment should be granted to defendant."

Plaintiff's objection: The response by Plaintiff indicates that he is not aware of such filings. It is improper for Defendant to factually misrepresent the response. The following motion to compel currently before the Court will reflect upon the truth and relevance of this matter:

1. Initial motion to compel production of documents (item 10).

8. Page 11 of Defendant's Motion For Summary Judgment.

"At other points in his testimony, plaintiff recognized that Prowler's supervisory status alone could not give rise to a cause of action by plaintiff. For example, in responding to a question about the nature of his mental anguish, plaintiff volunteered:

I'm not here to tell them who to make managers. That's certainly not my job. But you have to consider my rights too when you do so. You have no right to tell me to work for someone that's determined to hurt me".

Factual inference by Defendant: There is no cause for action if we ignore the fact that plaintiff would be required to work for a man who had made multiple threats of physical violence against plaintiff.

Plaintiff's objection: The fact is that Plaintiff was required to work for Ron Prowler if he wished to conduct examinations of the largest and most complex entities in accordance with his position description.

9. Page 14 of Defendant's Motion For Summary Judgment.

"Plaintiff recognizes that the procedure for excluding CEP cases and handling them through the regular program is a cumbersome one".

Plaintiff's objection: Neither the transcript of Plaintiff's deposition nor any other documentation reflects such an admission by Plaintiff. Plaintiff does not acknowledge that the process for exclusion is cumbersome or that the conduct of said examinations under the regular examination program is cumbersome. Plaintiff certainly does not accept the premise that even if a procedure is cumbersome; that is a legitimate, nondiscriminatory reason to violate an employees civil rights.

10. Page 14 of Defendant's Motion For SummaryJudgment.

"plaintiff has conceded a lack of evidence that management's decision was anything other than a good faith management decision"

Plaintiff's objection: No such concession has been made in Plaintiff's deposition nor in any other form. Plaintiff's response in the deposition was that the decision was poor tax

administration and the record demonstrates that the decision in question was retaliatory in nature.

11. Page 14 of Defendant's Motion For Summary Judgment.

"Accordingly, even assuming that plaintiff could establish a prima facie case of reprisal, his lack of any evidence whatsoever to suggest that management's proffered explanation of its actions is pretextual and that the real reason for the challenged actions dooms his claim."

Plaintiff's objection: The following motions to compel currently before the Court will reflect upon the truth of this matter:

1. Initial motion to compel production of documents (items 5).

2. Motion to compel third production of documents (items 2, 4, 6).

3. Motion to compel fifth production of documents (item 7).

12. Declaration of Deane Cox, Chief, EP/EO Division Southeast Key District, Internal Revenue Service (exhibit A) Defendant's MotionFor Summary Judgment:

The following statements are deemed to be misrepresentations by Mr. Cox and will be most properly addressed during the course of trial:

9. "I am aware that Mr. Blough's unwillingness to be a member of any group supervised by Mr. Prowler or otherwise to work under Mr. Prowler's supervision substantially limits Mr. Blough's ability to work CEP cases in Florida, since these are exclusively supervised by Mr. Prowler. However, in my opinion, this limitation cannot be deemed a hostile work environment for several reasons. First, it is a limitation of Mr. Blough's choosing. Second, Mr. Blough remains eligible to participate as a team member handling one or more CEP cases outside the State of Florida. Mr. Blough was recently offered the opportunity to participate in two CEP cases, one in Richmond, Virginia and one in Washington, D.C.; but he declined to do so.

10. I am also aware of Mr. Blough's position that various CEP or so-called 'CEP-qualified' cases should be specifically excepted from the program, such that he may work the cases in his current group. The procedure for excepting cases from the program is cumbersome and requires the ultimate approval of the national office. ..... Such declinations have never been made on account of Mr. Blough's history of EEO activity.

13. In summary, I have never treated Mr. Blough differently from other agents or subjected him to different terms, conditions or benefits of employment on account of his history of EEO activity or his disabilities.

DISCOVERY PROCESS INCOMPLETE AS TO ESSENTIAL INFORMATION:

Plaintiff's Request For Continuance Under Rule 56 Fed. R. Civ. P. in response to this Motion for Summary Judgment did specify twenty-five (25) requests which Plaintiff identified as essential to his opposition. Six (6) of the requests which were ordered to be produced under Order of this Court are the subject of a Rule 37(b)(2) motion currently before this Court. These requests are the most essential to Plaintiff's opposition to this Motion for Summary Judgment as illustrated in each of the requests presented within the Rule 37(b)(2) motion.

Failure by Defendant to fully comply with the discovery Order of this Court dated August 6, 1999 has rendered unnecessary Plaintiff's request for permission to file a thirty (30) page legal memorandum in response to Defendant's motion for summary judgment.

Rule 56(e) provides that, when a properly supported motion for summary judgment is made, the adverse party 'must set forth specific facts showing that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc. 106 S. Ct. 2505 (1986).

"This requirement in turn is qualified by Rule 56(f)'s provision that summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition. Id.

ADDITIONAL CAUSES OF ACTION PENDING BEFORE THE COURT:

Two motions are currently pending before the Court to amend the initial Complaint of employment related discrimination under Title VII of the Civil Rights Act of 1964.

The following comments were volunteered by Plaintiff during the deposition by Defendant of May 25, 1999 (page 58):

> "You know, I'd like to say I'm using the 1973 Rehab Act. I'm using Title 7 of the 1964 Civil Rights Act. I'm going to go under hopefully 42 -- Title 42, section 1985. These are just the means by which I'm trying to address what I think is a real injustice within the IRS. The way they've treated me. The way they've treated Mr. Prowler.
>
> It's all one big collection, and it's just one -- it's called discrimination from 1991 up through the present. I know we can try to isolate events and say this was discriminatory. It's all one collective event. And I think we have to look at the entire picture to understand. I'm really disappointed in the United States government. Not only for -- it wasn't their fault in Vietnam so much as it happened. Okay. And I accepted that. But I'm not accepting what they're doing to me here. And these maybe -- you know, I'm just using these as vehicles to address that."

Upon completion of the amending process the Complaint will incorporate the following courses of action (claims) which utilize three different routes to reach the ultimate conclusion of discrimination. The facts are consistent with each route; however the law and remedies differ.

1. Deprivation of a fundamental and protected liberty interest which exists within the Fifth

Amendment to the United States Constitution.

2. Unlawful intentional discrimination which is prohibited under Title VII, sections 704 and 717 of the Civil Rights Act of 1964, as amended.

3. Unlawful intentional discrimination which is prohibited under the Rehabilitation Act of 1973, as amended.

WHEREFORE, Plaintiff respectfully requests that the Court deny Defendant's motion for summary judgment in that a genuine issue of discrimination exists before the Court.

"S/ Melvin E. Blough" pro se

Melvin E. Blough
803 Tomahawk Trail
Brandon, FL 33511
(813) 651-3158

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been provided via certified mail to Assistant United States Attorney Warren Zimmerman this tenth day of September, 1999 in accordance with Federal Rule of Civil Procedure 5.

"S/ Melvin E. Blough" pro se

99-13735-FF

IN THE

United States Court of Appeals Eleventh Circuit

MELVIN E. BLOUGH,

Plaintiff-Appellant

v.

LAWRENCE SUMMERS,
Secretary of the Treasury,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

BRIEF FOR APPELLANT

MELVIN E. BLOUGH
Pro Se - Appellant
803 Tomahawk Trail
Brandon, FL 33511
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BLOUGH v. LAWRENCE SUMMERS, Secretary of the Treasury

(11th Cir. - No. 99-13735-FF)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In compliance with Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, the undersigned hereby certifies that the following listed persons and entities have an interest in the outcome of this case:

1. Roberta Bahnsen, Assistant United States Attorney, district court co-counsel for Secretary;

2. Melvin E. Blough, plaintiff-appellant, pro se;

3. Donna A. Bucella, United States Attorney;

4. The Honorable Susan C. Bucklew, United States District Judge;

5. Secretary of the Treasury, defendant-appellee;

6. Tamra Phipps, Assistant United States Attorney, Chief, Appellate Division;

7. Yvette Rhodes, Assistant United States Attorney, Appellate Division;

8. Susan Roark Waldron, Assistant United States Attorney, appellate counsel for Secretary.

9. The Honorable Charles R. Wilson, United States Circuit Judge, former United States Attorney (interested solely in his capacity as former United States Attorney); and

10. Warren A. Zimmermam, Assistant United States

Attorney, Chief, Civil Division, district court co
-counsel for Secretary.

STATEMENT REGARDING ORAL ARGUMENT

As the resolution of the issues in this case requires this Court to make an independent examination of the record in order to determine whether , oral argument by Appellant is not essential.

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STATEMENT OF JURISDICTION

This action represents an appeal of a final decision by the district court in the granting of summary judgment under Title 28 section 1291 and an appeal from an order denying a preliminary injunction under Title 28 section 1292(a)(1).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. In WASHINGTON v. GLUCKSBERG, 117 S. Ct. 2258 (1997) , the Court held that "our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' *id.*, at 503, 97 S. Ct., 1938 (plurality opinion); *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S. Ct. 330, 332, 78 L. Ed. 674 (1934) ('so rooted in the traditions and conscience of our people as to be ranked as fundamental'), and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed,' *Palko v. Connecticut*, 302 U.S. 319, 325, 326, 58 S. Ct. 149, 152, 82 L. Ed. 288 (1937). Second, we have required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest. *Flores, supra,* at 302, 113 S. Ct., at 1447; *Collins, supra,* at 125, 112 S. Ct., at 1068; *Cruzan, supra,* at 277-278, 110 S. Ct., at 2850-2851. Our Nation's history, legal traditions, and practices thus provide the crucial 'guideposts for responsible decisionmaking,' *Collins, supra,* at 125, 112 S. Ct.,

at 1068, that direct and restrain our exposition of the Due Process Clause."

The following question of law is presented to the Court:

Do totally and permanently disabled veterans have a fundamental and Constitutionally protected liberty interest which prohibits continuous acts of employment related threats of physical injury, discrimination and retaliation by an Executive Agency of the United States Government ?

2. Whether the district court erroneously denied the Motion for Summary Judgment.

3. Whether the district court improperly dismissed my motion to amend the Complaint to include a claim of Constitutional deprivation of a fundamental and protected Fifth Amendment liberty interest by the United States Government.

4. Whether the district court abused its discretion in the granting of the request for summary judgment.

STATEMENT OF THE CASE AND FACTS

(i) Course of proceedings and disposition in the court below:

The district court did deny my request for a preliminary injunction and did grant the motion for summary judgment by Agency.

I did appeal both decisions and the appeals have been consolidated before this Court.

(ii) Statement of the facts:

This Complaint encompasses a claim of Constitutional tort against the United States Government (Doc 97 and 104) and claims of civil rights violations directed to the United States Treasury (Internal Revenue Service hereafter referred to as "Agency") under Title VII of the Civil Rights Act of 1964 (Doc 1) and the Rehabilitation Act of 1973 (doc 33, 49, 106).

The genesis of the Complaint occurred in 1991 and as described in the court record; did precipitate a chain reaction of threatening and retaliatory actions against me by Agency management persons which continue to the present.

The factual circumstances pursuant to which Agency management persons Mike Rachael, Ron Prowler and Melanie Clark initially developed an animus against me are presented at my deposition of May 18, 1999 (Doc 89 pg 10 line 4 thru pg 45 line 22). The animus was initially directed to the taxpayer under examination by the Agency ; however was also directed to me for objecting to said conduct.

The subsequent threats of physical injury to me by Agency Group Manager Ron Prowler are discussed in the depositions of Gary Maxwell and Genny Farley taken on June 4, 1999 (Doc 89 pg 16 line 7 thru pg 17 line 21 and pg 11 line 12 thru pg 15 line 3 respectively) and my deposition taken on May 18, 1999(Doc 89 pg 46 line 4 thru pg 48 line 13).

Ron Prowler did cease to be the Group Manager of those employees in my post-of-duty effective October 1, 1991 and I have had essentially no contact with him since said date. Ron Prowler's replacement as Group Manager during 1992 and 1993 (Melanie Clark) had a historical and favorable working relationship with Ron Prowler and was one of the individuals referenced above who developed an animus against me. Melanie Clark did harass me during her tenure as Group Manager and did restrict the assignment of examinations to me to encompass only small entities as discussed in my deposition of May 18, 1999 (Doc 89 pg 61 line 4 through pg 62 line 14 and Doc 25 pg 16).

In 1993 I did file a formal Complaint with the Agency which complained of employment related discrimination by the specific management persons against the specified taxpayer and retaliation by said persons against me for objecting to said animosity (Doc 89) . The 1993 Complaint also referenced the September 23, 1991 threat of physical injury to me by Agency Group Manager Ron Prowler. I withdrew the 1993 Complaint based upon the erroneous belief that the threats and retaliation would stop (Doc 89).

In 1995 I did file a Complaint with the Agency and the Equal Employment Opportunity Commission (EEOC) based upon the September 21, 1995 threat of physical injury to me by Agency Group Manager Ron Prowler (Doc 89). The threat in 1995 was precipitated by my reporting of the September 23, 1991 threat to the new Division Chief (Pat Cox) and Assistant Division Chief (Peter Breslin) as reflected in the June 4, 1999 deposition of

Genny Farley (Doc 89 pg 11 line 12 thru pg 15 line 3).

The 1995 Complaint was not accepted for investigation by the Department of the Treasury Regional Complaint Center on the basis that the threats provide "no conceivable impact on your employment" and the threats "were not followed by a personal loss or direct harm to you" (Doc 89). I immediately appealed the dismissal to the EEOC on the basis that a threat of violence against a disabled person is sufficient to justify a claim of discrimination and it is not necessary for the violent act to have actually occurred for relief to be granted. The EEOC denied my appeal based the conclusion that actual present harm (as opposed to possible future harm) must exist (Doc 89).

In August 1995 the Agency did initiate a Coordinated Examination Program (CEP) examination in central Florida and I did function as the team coordinator under the direction of Case Manager Genny Farley for the remainder of 1995 as discussed in the deposition of Genny Farley (Doc 89 pg 10 lines 3 through line 16). Responsibility of Case Manager was transferred to Group Manager Lee Cogburn effective January 1, 1996 and I remained team coordinator of said CEP examination until the conclusion of the examination in September 1997 as discussed in my deposition of May 15, 1999 (Doc 89 pg 83 lines 6 through 11).

Effective October 1, 1997 I was assigned to Group Manager Terri Rodriguez. Ms. Rodriguez had a historical and favorable working

relationship with Ron Prowler prior to becoming an Agency Group Manager. Ms. Rodriguez has harassed me during her tenure as Group Manager and has restricted the assignment of examinations to me to encompass only small entities (Doc 25 pg 16 and doc 12 and doc 15).

In 1997 I did file a Complaint of discrimination with the Agency based upon a claim of retaliation for filing the 1995 Complaint (Doc 89). The basis in the 1997 Complaint is that the Agency (Division Chief Pat Cox and Assistant Division Chief Peter Breslin) did change a term or condition of my employment in requiring me to work for Agency Group Manager Ron Prowler if I wished to conduct examinations of the largest and most complex entities as presented in the June 28, 1999 deposition of Pat Cox (Doc 89 exhibits 1 and 3). My Standard Position Description is presented in the deposition of Gary Maxwell (Doc 89 exhibits 2, 3, 4 Article 26 section 3 A of the Agency/Union Contract) and provides that I am required to conduct examinations of the largest and most complex entities. The Agency has admitted that I did in fact conduct said examinations for substantially the entire period beginning October 1, 1988 and ending September 30, 1997 (Doc 66). The Agency has also admitted that in refusing to work for Agency Group Manager Ron Prowler due to the threats against me, the examinations assigned to me have been below my grade level (Doc 89 pg 60 lines 18 and 19 of the June 28, 1999 deposition of Pat Cox).

Division Chief Pat Cox did state that it is part of his job responsibilities as Division Chief to be made aware of what EEO complaints are

filed and, if possible, to actively seek resolution (Doc 89 pg 10 line 18 through pg 11 line 3 of the June 28, 1999 deposition of Pat Cox).

The Agency handbook of employee conduct and ethical behavior (which provides guidance to penalty determinations) states that threatening another employee with physical harm subjects the employee to reprimand or removal (Doc 89). During the deposition of Division Chief Pat Cox on June 28, 1999 I did reference the threats by Ron Prowler and the required penalties. Pat Cox acknowledged that he took no actions in regard to the allegation (Doc 89 pg 22 line 18 through pg 24 line 20).

The largest and most complex examinations are designated as Coordinated Examination Program (CEP) qualified cases. Section 7(10)(18)4.2(2) of the Internal Revenue Manual provides that a District may exclude a CEP case from the program for any reason (Doc 89).

Division Chief Pat Cox did state that there are more CEP identified examinations in Florida than the Agency can do in the next 100 years (Doc 89 pg 43 line 12 through pg 44 line 11 of the June 28, 1999 deposition of Pat Cox).

Division Chief Pat Cox did state that cases were not excluded from the CEP universe of qualified cases because "I think that those cases should be worked using CEP procedures" (Doc 89 pg 46 line 8 throug hpg 48 line 9). I did respond that based upon my personal audit experience; said cases could be done just as well under the regular examination (as opposed to CEP) program. No further response was provided by Pat Cox (Doc 89 pg

49 lines 6 through 16 of the June 28, 1999 deposition of Pat Cox).

During the deposition of Division Chief Pat Cox it was stated that no CEP examinations were conducted in Northern, Central or Southwestern Florida during 1995, 1996, 1997 or 1998 (with the exception of the CEP examination which I did conduct from August 1995 through September 1997). It was also stated that 61 percent of the CEP identified entities located in Florida are located in said geographic area. Pat Cox did state that "we just don't have the resources (to do them), quite honestly" (Doc 89 pg 53 line 16 through pg 55 line 1).

When I inquired as to who made the decision to eliminate me from the CEP qualified examinations; my Branch Chief Mike Rachael responded "well it was kind of a decision by a number of us" (Doc 89 pg 50 lines 1 through pg 52 line 2 of my deposition of May 25, 1999). Mike Rachael was one of the individuals referenced above who displayed an animus against me dating back to 1991.

There exists a category of large examinations that are not identified or qualified for the CEP program (i.e. "Code 8 and Code 9 cases" with gross receipts and/or assets over $10 million). When I mentioned to Division Chief Pat Cox that the cases assigned to me approximated $5 million, he stated "I am not sure $5 million even qualifies as a grade 13 case, quite candidly". I have been a GS-13 since 1989. (Doc 89 pg 58 line 20 through pg 60 line 19).

The court was aware of my status as a totally

and permanently disabled veteran, third-party confirmation as to threats of physical harm to me, testimony before the United States Senate Finance Committee relative to the abusive management "culture" within the Agency, and my mental/physical condition prior to the court's decision on my request for a preliminary injunction (Doc 25).

I did present a claim of Constitutional deprivation of a protected liberty interest in response to the question of irreparable injury at the preliminary injunction hearing. The claim of Constitutional deprivation also addressed the merits of the Complaint and the public interest factor (Doc 25 pgs 1 thru 20 and Doc 32). I was unable to predict the manner in which the continued violation of my Constitutional right to liberty would be infringed upon by the Agency (Doc 32).

A United States Magistrate did on May 25, 1999 state that the Agency will be required to comply with his findings relative to my discovery requests (Doc 60 pg 44 lines 17 thru 19). By Order dated August 6, 1999 the United States Magistrate did compel discovery of materials which I deemed essential to my response to the motion for summary judgment by the Agency (Doc 96 and 107). The Agency failed to obey the court's discovery Order of August 6, 1999 (Doc 101) and said failure did continue on date the court granted Agency motion for summary judgment (Doc 103).

My response to the motion for summary judgment by Agency (Doc 107) did state that summary judgment should be denied in that I had not had the opportunity to discover

information essential to my opposition to the motion for summary judgment and a motion to amend the Complaint to include a claim for deprivation of a Constitutional right was pending before the court. The Order of the court granting summary judgment to Agency is silent as to the outstanding discovery Order (Doc 96) and the motion to amend the Complaint to include a claim of Constitutional deprivation of a fundamental and protected liberty interest (Doc 97 and 104).

The motion for summary judgment by Agency (Doc 75) did not question the relevancy of the span of time between my 1995 Complaint and the adverse employment action in 1997.

The Complaint before the court addresses eight years of threats, harassment, intimidation and retaliation as a pretext for adverse action of a continuous nature (Doc 107 pgs 8 thru 11).

At no point in the court record did I allege that the "reorganization" and creation of Group 7214 was done to retaliate against me nor does the court record indicate that the decision to create Group 7214 was in response to a national IRS office decision. The Order of the court granting Agency motion for summary judgment (Doc 111) addresses only those questions relating to the assignment of CEP examinations and fails to comment on the very extensive number of Code 8 and Code 9 examinations which I was also discriminatingly excluded from the examination of (doc 107 pg 15) and which remain outstanding contrary to the discovery

Order of the court dated August 6, 1999 (Doc 101).

The Order of the district court granting Agency motion for summary judgment (Doc 111) did render moot all pending motions; including the motion to amend the Complaint to include a claim of Constitutional tort against the United States Government (Doc 97 and 104).

(iii) Standard of review:

The standard of review relative to the Order denying the request for a preliminary injunction is that of a clearly erroneous finding by the district court.

The standard of review relative to the Order granting the motion for summary judgment and denying as moot all other pending motions is a de novo process with the reviewing court applying the same legal standards as the district court. Hammer v. Slater, etal., 20 F.3d.1137(11th Cir. 1994).

ARGUMENTS

1. "Analytically the bill of rights are bills of liberties. They guarantee that the agents and agencies of politically organized society will not do certain things and will not do certain other things otherwise than is certain ways". *Dean Roscoe Pound - The Development of Constitutional Guarantees of Liberty".*

AMENDMENT V to the Constitution of the United States provides a number of guarantees, one of

which is that no person shall be deprived of liberty without due process of law

Discrimination may be so unjustifiable as to be violative of due process. Detroit Bank v. United States, 63 S. Ct. 297; Bolling v. Sharpe 74 S. Ct. 693(1954); Schneider v. Rusk 84 S. Ct. 1187 (1964).

The right is fundamental because it is preservative of all rights. YickWo v. Hopkins, 6 S. Ct. 1064.

The principles laid down in this opinion affect the very essence of Constitutional liberty and security. They reach further than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense, ---- it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Boyd v. United States, 6 S.Ct.524.
Congressional Record - Hous eof Representatives
April 17, 1944:

VETERANS PREFERENCE IN THE FEDERAL CIVIL SERVICE

Mr. Starnes of Alabama. Mr. Speaker, from the very inception of our Republic our Government has extended certain special benefits and

privileges to the men who have offered their lives in the defense of the country and its institutions. This is a sound principal. Those who are selected from among us to wear the uniform and to serve the country on the firing line are certainly entitled, when peace has been won through their efforts, to be selected and given special consideration and preference in employment by the Government in peacetimes. That is a reward to an American who has willingly and gladly offered his life in an effort to save and to sanctify for us the principles of government under which we live, and which by their sterling efforts is being handed on to posterity.

The first comprehensive federal veterans' statute was enacted in Veterans' Preference Act of 1944, 58 Stat 387. The Federal Government has, however engaged in preferential hiring of veterans, through official policies and various special laws, since the Civil War. See, e.g. Res. of Mar. 3, 1865, No. 27, 13 Stat. 571. Personnel Adm'r of Massachusetts v. Feeney, 99 S. Ct. 2282 (1979).

The Federal Government, in its capacity as an employer, determined to take the lead in such a program. The Veterans' Preference Act was accordingly adopted, creating special preference and protection for returning veterans at every stage of federal employment. Mitchell v.Cohen, 68 S. Ct. 518 (1948).

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

VETERANS PREFERENCE

Sec. 712. Nothing contained in this title shall be

construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.

U.S.C. TITLE 5 sections 2108 and 3502 provide special considerations to disabled veterans upon entering and retaining employment with the Federal Government.

U.S.C. TITLE 38 provides an extensive array of benefits available to disabled veterans including healthcare, education, housing assistance, clothing allowance, car allowance, compensation for service connected injuries, insurance, etc.

Doc. 25 provides exerts from the IRS OVERSIGHT HEARINGS before the Committee on Finance United States Senate. A thorough review of the comments during the January 28, 29; February 5, 11, and 25, 1998 hearings and the April 28, 29, 30, and May 1, 1998 hearings reflects upon a very abusive management "culture" within the Agency.

I have endured eight years of managerial abuse within the Agency and I know that it is not the Ron Prowler's or the Pat Cox's that are to blame, but rather the Agency itself.

The first time I really felt handicapped after Vietnam was on September 23, 1991 when Ron Prowler put his fist in my face and backed me against those file cabinets. He took something special away from me that day.

2. The district court denied the request for preliminary injunction based upon a finding that I had failed to prove irreparable injury and

substantial likelihood of prevailing on the merits (Doc. 32 pg 16).

The United States Supreme Court has ruled that loss of Constitutional rights constitutes irreparable injury. Elrod v. Burns 96 S. Ct. 2673 (1976). I believe the district court failed to properly consider the facts presented and the law in that this is truly the genuinely extraordinary situation required by the United States Supreme Court in Sampson v. Murray, 94 S. Ct. 937 (1974).

3. The district court ruled improperly (Doc. 111) that my motion (Doc. 97 and 104) to amend the Complaint as moot. As in the case of Sherman v. Hallbauer, 455 F.2d 1236 (5th Cir. 1972) ; in the interst of justice the court should have allowed the amendment. This decision within the Fifth Circuit is binding on the Eleventh Circuit Bonner v City of Prichard, Ala, 661 F.2d. 1206 (11th Cir. 1981).

4. The district court clearly abused its discretion in that it went beyond the pleadings of both parties (Doc. 75 and 107) and drew inferences which were erroneous and unsupported by either the facts or the law. In my response (Doc 107) to the motion for summary judgment (Doc. 75) I did throughout the response state that I had not had the opportunity to discover information that is essential to my opposition to the motion for summary judgment and referenced Anderson v. Liberty Lobby, Inc.106 S. Ct. 2505 (1986). The district court judge ignored the outstanding court Order issued by the magistrate.

I also referenced the pending motion to amend the Complaint.

The district court incorrectly assumed that because I filed my EEO Complaint in 1995 and there were no reported adverse actions taken until 1997 that there was no causal relation between the two events. As the pleadings to the motion for summary judgment indicate, neither party entertained this erroneous assumption. During the period beginning August, 1995 and September, 1997 I did function as case coordinator on a CEP examination under the direction of a Group Manager who has not animus towards me in that we did work together as employees in 1983. It was not until I completed the CEP examination in September, 1997 that Agency management persons had an opportunity to retaliate against me. The district court is incorrect in assuming that a statue of limitations does exist relative to acts of retaliation. This matter could have been clarified at a summary judgment hearing.

The district court also incorrectly accepted the non-discriminatory explanation by Division Chief Pat Cox that the process for excluding cases from the CEP program was cumbersome. During the deposition of Pat Cox he stated that it was necessary that said cases be completed under CEP exam procedures; however when I pointed out that said examinations could be completed equally well under the regular examination program he did not comment. For purposes of summary judgment he has chosen to rely upon the vague term "cumbersome" Filing one's income taxes is cumbersome but we all do it because it is the law. It is not acceptable to discriminate against an individual because it would be cumbersome not to do so.

CONCLUSION

For the reasons stated above, it is requested that the motion for preliminary injunction be granted, the motion for summary judgment be denied, and the case remanded to the district court with proper instruction.

Respectfully submitted via certified mail this eight day of November, 1999.

"S/ Melvin E. Blough" pro se

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that a true and correct copy of the foregoing has been provided via certified mail to Assistant United States Attorney Susan Roark Waldron this eight day of November, 1999.

"S/ Melvin E. Blough" pro se

99-2435-FF
99-13735-FF

CONSOLIDATED APPEAL

IN THE

United States Court of Appeals Eleventh Circuit

MELVIN E. BLOUGH,

Plaintiff-Appellant

v.

SECRETARY, DEPARTMENT OF THE TREASURY,

Defendant-Appellee.

CONSOLIDATED APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

REPLY BRIEF FOR APPELLANT

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ARGUMENTS AND CITATIONS OF AUTHORITY

This Complaint is not about work assignments as the Secretary has suggested to the Court. *

The following exchange between myself and counsel for the Secretary touches upon the basis for this Complaint (R2-89 deposition May 25, 1999 pg 52 lines 9 thru 20):

Question by Secretary: So, in your view much or all of your mental anguish and your need for Paxil would disappear if you were simply allowed to work CEP-qualified cases under the supervision of somebody besides Ron Prowler ?

My answer: No. What's happened is we -- they pushed me so hard I can't accept anymore -- and I talked it over with the VA psychiatrist. This country you had a very negative affect on my life in Vietnam. Now I go to work for the IRS, and you're doing it again. And you don't have that right. There's no reason for that man to threaten me. There's no reason for them to retaliate against me. And I won't tolerate that.

I have appealed to this Court to address four issues relative to my Constitutional and civil rights. I will reply to the Brief of Appellee in the same sequence as the issues were presented in my initial Brief.

ISSUE NUMBER ONE OF APPELLANT'S BRIEF

Do totally and permanently disabled veterans have a fundamental and Constitutionally protected liberty interest which prohibits continuous acts of employment related threats of physical injury, discrimination and retaliation by an Executive Agency of the United States Government ?

Appellee's brief fails to provide comment relative to this issue.

*Appellant adopts the designation of Appellee as "Secretary" for purpose of continuity with Brief of Appellee.

I will supplement my original brief as follows:

In preparation for this reply I read the proceedings and debates of the 88th Congress relative to the Civil Rights Act of 1964 as they appear within the Congressional Record. H.R. 7152 was introduced in the House June 20, 1963 and passed by the Senate June 19, 1964. The civil rights bill was a very interesting part of America's history and involved hundreds of hours of debate. Title VII was a very controversial portion of the Act.

My reason for said research was to determine the thought process by which, and the basis for which, Congress developed and included section 712 of Title VII. Section 712 provides that "nothing contained in this title shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans". There was no debate on section 712 -- it may have been the only section upon which all were in agreement.

Section 712 of Title VII Civil Rights Act of 1964 was born of the United States Constitution and Congress did by statute bridge the gap between said Act and the Constitution. No provision of Title VII of the Civil Rights Act of 1964 may restrict a veterans Constitutional rights and the Courts, not legislative bodies, are charged with the duty to interpret the legitimate rights of veterans under the Constitution of the United States.

The equal employment provisions of the Civil Rights Act were designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination. Alexander v. Gardner-Denver Company, 94 S. Ct. 1011 (1974).

The due process clause of the Fifth Amendment contains an equal protection component prohibiting the United States government from invidious discrimination. Washington v. Davis, 96 S. Ct. 2040 (1976).

The reliance by Secretary on *Brown v. General Service Administration, 96 S. Ct. 1961 (1976)* is misplaced based upon the express provision of Congress under Section 712 of Title VII of the Civil Rights Act of 1964 and the finding by the United States Supreme Court that discrimination by the United States government may be so unfair as to violate Fifth Amendment rights.

The Federal rights question presented as issue number one is believed to meet the United States Supreme Court's substantive-due-process analysis as presented in Washington v. Glucksberg, 117 S. Ct. 2258 (1997).

The foundation for this Complaint originated twenty-eight years ago when I sat in a wheelchair at a United States Army hospital as a result of injuries received in Vietnam. Based upon personal experience, I came to believe that there are no persons in America more deserving of the Constitutional protections of the Fifth Amendment than the totally disabled veterans who fought and endured pain and sacrifice to defend the principals within said Constitution.

ISSUE NUMBER TWO OF APPELLANT' BRIEF

I wish to apologize to the Court in that I incorrectly inserted the phrase Summary Judgment in the statement of issue number two of Appellant's Brief.

Issue number two is correctly stated as follows:

2. Whether the district court erroneously denied the Motion for Preliminary Injunction.

Appellee recognized the error and correctly identified the Motion on page one (item 1) of the Brief of Appellee dated December 13, 1999.

REPLY

Prior to the preliminary injunction hearing I did timely file the following documentation which was entered into the court record:

A. Narrative reflecting upon the acts of harassment subsequent to the date of filing the Complaint with the district court (R1- 12 and R1-15).

B. Excerpt Doc. 25 (brown folder) which included the following items of most importance to the determination before the district court:

1. An extensive twenty page narrative with memorandum of Constitutional law and chronology of the threats, harassment and retaliation over the prior eight year period. On pages 19 and 20 of the narrative I did state the following:

"As a 100% service-connected disabled

veteran Plaintiff had a Constitutional right not to be threatened with physical injury under the analysis presented in *Washington v. Glucksberg.*"

I did reference the capable-of-repetition doctrine as presented by the Supreme Court in *City of Los Angeles v. Lyons, 103 S. Ct 1660 (1983)* due to the fact that the persons who had retaliated against me, threatened and harassed me in the past; still had direct and indirect supervisory authority over me.

2. Confirmation of my status as a 100% permanent and totally disabled veteran in correspondence from the Department of Veterans Affairs dated March 19, 1997.

3. Third-party confirmation of the physical threat by Ron Prowler against me (EEOC decision dated December 5, 1996 page 2).

4. Copies of the three EEO Complaints which I previously filed against the Secretary.

5. Refusal by the Secretary to investigate the threat by Ron Prowler because he had not provided physical injury to me (correspondence dated March 4, 1996 from the Department of the Treasury Regional Complaints Center).

6. Memorandum dated November 18, 1997 from the Division Chief requiring me to work for Ron Prowler if I wish to conduct CEP examinations. This requirement represented blatant retaliation under the circumstances.

7. Congressional review and confirmation of the abusive management "culture" which exists within the Internal Revenue Service.

R4-32 provides a transcript of the preliminary injunction hearing. The hearing was of short duration in that the Court informed me that "we don't have all morning to do this" (R4- 32 pg 6 lines 15, 16). I repeatedly claimed my Fifth Amendment Right to be free from threats of physical harm, harassment and retaliation. At the conclusion of the hearing the district court declared that my claim to Fifth Amendment protection was "emotional distress" and there was no legal reason or basis to grant an injunction (R4- 32 pg 17 lines 4 thru 18).

We cannot say with assurance that under the allegations of the pro se complaint which we hold to less stringent standard's than formal pleadings drafted by lawyers, it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief ". Haines v. Kerner, 92 S. Ct. 594 (1972).

Because my claim to a preliminary injunction arose under the Federal Constitution, the district court had jurisdiction over the subject matter of the case (28 U.S.C. sec. 1331 (1988)) and the same due diligence in safeguarding Constitutional rights as accepted by the United States Supreme Court in *Norris v. State of Alabama, 55 S. Ct. 579 (1935)*

The due process clause of the Fifth Amendment contains an equal protection component prohibiting the United States government from invidious discrimination. Washington v. Davis, 96 S. Ct. 2040 (1976).

The standard for adjudicating claims of invidious racial discrimination under the due process clause of the Fifth Amendment is not identical to the standards applicable under the Equal Employment Opportunity Act. Washington, 96 S. Ct. at 2041.

The standard of review to the Order denying the request for preliminary injunction (R1- 27) is that of a clearly erroneous finding by the district court.

The district courts conclusion that my Fifth Amendment right to liberty had no legal basis and was properly characterized as "emotional distress" (R4- 32 pg 17 lines 4 thru 18) was an error of law and is properly reversed upon de novo review by the Appellate Court. Pullman-Standard v. Swint, 102 S. Ct. 1781 (1982). Findings of fact grounded on an erroneous view of the law do not bind the appeals court. Swint, 102 S. Ct. at 1789. The legal mistake has affected the challenged findings. Lincoln v. Board of Regents, 697 F. 2d 928 (11th Cir). Where findings are infirm because of an erroneous view of the law, a remand is proper course unless the record permits only one resolution of the factual issue. Swint, 102 S. Ct. at 1792.

The Secretary would have this Court believe this Complaint does not fall within the "genuinely extraordinary situation" envisioned by the United States Supreme Court in *Sampson v. Murray, 94 S. Ct. 937 (1974).* This Complaint, which encompasses eight years of physical threats, harassment, intimidation and retaliation by the United States Government against a one hundred percent (100%) disabled veteran with two artificial legs and loss of use of one hand, is unique, unconscionable, and therefore genuinely extraordinary.

ISSUE NUMBER THREE OF APPELLANT'S BRIEF

Whether the district court improperly dismissed my motion to amend the Complaint to include a claim of Constitutional deprivation of a fundamental and protected Fifth Amendment liberty interest by the United States Government.

REPLY

Secretary incorrectly argues on page 28 of Appellee's Brief that I failed to provide an argument relative to the issue and therefore I have waived said issue.

My argument on page 11 item three of Appellant's Brief does in fact reference a Fifth Circuit case which is binding precedent on the Eleventh Circuit. The referenced case does provide a conclusion by the Appellate Court that in the interest of justice the district court should have allowed the amendment to the Complaint which was presented during the summary judgment process.

The subject Motions (R3- 97 and R3-104) were properly filed with the district court and were referenced in Plaintiff's Response to Defendant's Motion For Summary Judgment (R3-107 pg 22 item 1).

In one broad sweep of the brush the district court did deny as moot "all other motions pending in this action" which did encompass the subject motions (R4-111 pg 8).

The grant or denial of an opportunity to amend pleadings pursuant to Federal Rules of Civil Procedure Rule 15(a) is within the discretion of the Federal District Court, but outright refusal to grant leave without any justifying reason appearing for the denial

is not an exercise of discretion, and is merely abuse of discretion and is inconsistent with the spirit of the Federal Rules. Foman v. Davis, 83 S. Ct. 227 (1962).

ISSUE NUMBER FOUR OF APPELLANT'S BRIEF

Whether the district court abused its discretion in the granting of the request for summary judgment.

REPLY

Corrections to statement of the case by Secretary.

A. Course of proceedings and disposition in the court below:

(Page 2) The initial Complaint was brought under Title 42 U.S.C. sections 2000e-5, 2000e-16 (R1-1 pg. 4).

(Page 2) The allegation of retaliation was precipitated by the written requirement that I agree to work for Ron Prowler in order to conduct examinations of the largest and most complex entities (R1-1 pg 3, R2-89 deposition Deane Patrick Cox exhibit 3, R3-107 pg 18 item 8).

(Page 6) "The magistrate court conducted a hearing on Blough's motions to compel discovery on August 5, 1999, and resolved all outstanding discovery requests".

Not a true statement. During the discovery hearing on May 25, 1999 the Magistrate Judge did assure me that he would compel discovery (R5-60 pg 44 lines 17 thru 19). I was forced to file motions for sanctions under Rule 37(b)(2) FRCP (R3-101 and R3-109). The Rule 37 (b)(2) motion

was listed as a basis for denial of Defendant's motion for summary judgment (R3-107 pg 2 item 3, pg 20 and 21). The Rule 37(b)(2) motion was deemed moot by the district court's Order granting summary judgment (R3-111 pg 8).

(Page 6) "Blough responded to the Secretary's motion for summary judgment on September 10, 1999, reiterating the claims made in his motions to continue the district court's consideration of the Secretary's motion for summary judgment."

Not a true statement (R2-89 and R3-107). I moved for denial of motion for summary judgment (R3-107) based upon four considerations as opposed to the single factor presented for consideration in my request for continuance (R2-89).

B. Statement of the facts:

(Page 7) "Blough refrained from formally complaining about Prowler's behavior for more than two years".

Not a correct statement. I reported the threat to Division Chief, Terry Hallihan (R1-1 pg 2). Excerpt Doc 25 (narrative pg 11 and exhibit of Internal Revenue Service memorandum titled Employee Harassment dated September 23, My deposition of May 18, 1999 (R2-89 pg 36 line 19 thru pg 41 line 10/pg 47 line 21 thru pg 48 line 13). R2-89 document titled Acknowledgment of Conditions of Department (of Justice) Representation relative to Church of Scientology examination (provision 5 prevented me from filing EEO Complaint relative to the September 23, 1991 incident pending resolution of Scientology lawsuit September 3, 1993).

(Page 8) "Group 7212 did coordinated examination program work. Prowler's Group 7210 and the Baltimore group (number unknown) were the only ones handling CEP examinations."

Not a correct statement. During the period October 1, 1995 through September 30, 1997 the agents assigned to Prowlers Group 7210 did both CEP and regular examination program work. Group 7212 (Atlanta) and 7201 (Baltimore) did only CEP examinations (R2-75 my deposition of May 18, 1999 pg 83 line 6 thru pg 85 line 23).

(Page 9) "In 1995, Blough made a claim under the Rehabilitation Act for hostile work environment."

Not a correct statement. The 1995 EEO Complaint did complain of Title VII and Rehabilitation Act violations (Doc 25 exhibit brown folder).

(Page 9) In 1997 (not 1995) three CEP groups were authorized by the Regional Commissioner (not the Secretary).

(Page 10) "Cox then assigned Blough to Group 7210".

I requested Group 7210 to stay away from Prowler. (R2-75 my deposition May 25, 1999 pg 47 line 20 to pg 48 line 2).

(Page 10) "Blough, however continues to be assigned the work of a GS-13 revenue agent."

Not a true statement. Please refer to R2-66 Defendant's response to Plaintiff's Request

number 2 wherein it was admitted that gross receipts of assigned cases approximated $5 million. Please refer to the deposition of Division Chief Deane Patrick Cox wherein it is acknowledged that "I am not sure $5 million even qualifies as grade 13, quite candidly" (R2-89 deposition of June 28, 1999 pg 60 line 16 thru line 19).

(Page 10) "Blough maintains that his exclusion from CEP examinations constitutes retaliation for his previous Equal Employment Opportunity (EEO) activity."

Not a true statement. The retaliation took two forms, neither of which were addressed by the district court or the Secretary during the summary judgment process (R3-107 pg 14 item 1).

The deposition of Division Chief Cox on June 28, 1999 sheds light upon the various forms which the acts of retaliation took during the period October 1, 1997 to March 8, 1999 (R2-89):

Deposition exhibit 3 provides that I was required to work for Prowler to conduct CEP examinations. The authors of said memorandum (Division Chief Cox and Assistant Division Chief Breslin) were not uninformed management persons, but rather informed decision-makers who were personally informed by myself and Group Manager Farley of the 1991 and 1995 threats against me by Prowler (R2-89 exhibits and depositions of Farley, Cox and myself).

Said memorandum of November 18, 1997 references the August 27, 1997 memorandum

(R2-89 exhibit) from me which paraphrases the basis for which the Department of the Treasury denied my 1995 EEO Complaint (Doc 25 correspondence dated March 4, 1996). A copy of the November 18, 1997 memorandum was forwarded to the EEO Officer per notations at the bottom of the memorandum.

I did inform Division Chief Cox in August 1997 that I would not work for Prowler (R2-75 my deposition of May 25, 1999 pg 47 line 20 to pg 48 line 2).

Division Chief Cox acknowledges during his deposition that he is made aware when EEO Complaints are filed (R2-89 pg 10 line 18 to pg 11 line 6). The EEO Counseling Report dated September 10, 1997 reiterates my refusal to work for Prowler (Doc 25 exhibit brown folder).

The deposition of Division Chief Cox contains an extensive discussion of "Code 8 and Code 9 cases" (R2-89 pg 58 line 17 to pg 60 line 21). The following statement was presented by Division Chief Cox at R2-89 pg 63 line 3 to line 6:

> "and I think we should be -- in my personal opinion, we should be using grade 13 revenue agents to do the Code 8 and Code 9 cases that don't qualify as CEP".

C. Standard or scope of review.

I continue to believe the standard of review per page 8 of my initial brief to be correct.

I. Appellee's summary of the argument. Argument and citations of authority the district court did not abuse its discretion in denying Blough's motion for a preliminary injunction.

REPLY

See discussion per issue number two of this reply brief which I submit as the appropriate response to the above referenced argument.

II. Appellee's summary of the argument. Argument and citations of authority the district court did not err in granting the Secretary's motion for summary judgment.

REPLY

(Page 19) "A district court may resolve a dispositive motion prior to completion of all requested discovery when the record already is sufficient to allow resolution. Blough's pending requests for discovery would not have developed evidence to show that the Secretary's reason for the disputed assignments, the dispositive issue, was pretext. His pending requests were not relevant to the dispositive issue and were overly burdensome."

I am concerned as to the statements by the Secretary on page 20 "The Secretary had complied with the magistrate court's order prior to summary judgment" and the statements on the balance of pages 20 and 21. These statements are incorrect and I submit to the Court that R3-96, R3-101, R3-109 prove said statements to be in error.

I did in my response to defendant's motion for summary judgment specify that the following requests

were essential to respond to said motion (R3-107 pgs 2, 20, 21) and the basis for the requests:

A) Listing of Code 8 and Code 9 cases (R2-80 pgs 2, 3 and R3-107 pgs 14, 15).

B) Documentation of threats of injury by Prowler to employees. This request was essential to the disparate treatment test under Title VII claim, 1973 Rehabilitation Act claim, and the continuous violations/causal link between the prior EEO Complaints and the retaliation (R2-62 pgs 3, 4 and R3-107 pg 18 request).

C) Documentation of the administrative processing of my November 18, 1997 EEO Complaint within the Baltimore District Office (R2-82 pg 2 and R3-107 pgs 12, 13 request retaliation factor #3).

The above referenced documentation was essential to my response to Secretary's motion for summary judgment and were pending under a Magistrate Court Order (R3-96) at the time the district court judge rendered the motion for summary judgment (R3-111). The Order granting summary judgment (R3-111) addresses only my exclusion from CEP cases and ignores my exclusion from Code 8 and Code 9 cases. The Secretary's response within R2-80 pgs 2 and 3 indicates there were thousands of these types of entities which could have been assigned to me for examination and were not (R2-66 response to Plaintiff's request #2).

The documents in question would have affected the outcome of the motion for summary judgment and the district court deprived me of the opportunity to fully

respond to the motion for summary judgment as required in Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505 (1986).

(Page 23) "Blough did not either allege in complaint or establish in his response to the Secretary's motion for summary judgment that the Secretary had made any statement that showed an intent to discriminate against Blough on any prohibited basis."

The initial Complaint (R1-1 pg 3 second paragraph) references the November 18, 1997 memorandum from Division Chief Cox stating that I must agree to work for Prowler to conduct CEP examinations.

The response to the motion for summary judgment references the limitations of the November 18, 1997 memorandum from Division Chief Cox (R3-107 pg 12 first paragraph).

The memorandum of November 18, 1997 was devastating to me in that it was an affirmation (approval) by IRS management persons/decisions-makers Cox and Breslin of the prior physical threats by Prowler against me. Cox and Breslin were both knowledgeable as to the prior threats and said retaliatory memorandum was precisely the opposite of the relief I had requested in my prior EEO Complaints (i.e. no Prowler and I conduct CEP examinations). See prior EEO Complaints R2-89 exhibits.

I disagree with the district courts conclusion that "there were no material disputed facts which tend to show any casual link between the protected activity asserted and the adverse employment action as stated" (R3-111 pgs 6, 7). As I stated in my response to the motion for summary judgment --- Prowler was the link (R3-107 pgs 12, 13).

I disagree with the district courts conclusion that "Defendant has offered a legitimate, non-discriminatory reason for the 'adverse employment action' at issue. Group 7214 was not put under Prowler's supervision as a response to a mandate issued by the IRS's national office in 1997.

The claim that removal of CEP cases from the CEP program is cumbersome was disputed by me (R3-107 pgs 18, 19). The Internal Revenue Manual (R2-89 exhibit) provides that a CEP identified case may be excluded from the program "for any reason" and examined under the regular examination program. The Form 4791 exclusion form specified in Internal Revenue Manual section 7(10)(18)4.2(4) is a one page document (R2-89 exhibit).

The proffered explanation by Division Chief Cox for not excluding CEP qualified cases from the program changed when challenged during his deposition of June 28, 1999 (R2-89 exhibit pg 46 line 18 to pg 49 line 17). For purposes of the motion for summary judgment the process became "cumbersome". Under the facts and circumstances presented, I don't believe the phrase "cumbersome" would meet the test as evidence of a legitimate nondiscriminatory reason under Texas Dept. of Community Affairs v. Burdine, 101 S. Ct. 1089 (1981). "Cumbersome" is one step above "inconvenient" and I believe that neither is acceptable for purposes of summary judgment.

(Page 26) "The Secretary's employee, Division Chief Pat Cox, stated in his affidavit that he had made the complained-of assignments for legitimate business reasons." "Blough could participate in CEP cases elsewhere, but has declined to most recent opportunities".

I have extensive experience conducting examinations of CEP qualified entities and was restricted to the examination of the smallest entities from October 1, 1997 thru March 8, 1999 (R2-66). Said restriction was contrary to my OPM Standard Position Description which provides that I am to conduct examinations of the largest and most complex tax-exempt entities (R2-89 exhibit).

My annual performance evaluations since 1989 have been outstanding and I have received a variety of performance awards from the Department of Justice, IRS National Office, etc. (R2-89 exhibits).

Division Chief Cox acknowledges that there are more CEP examinations than the Division can do in the next one hundred (100) years and the CEP examinations are more successful than regular program examinations in obtaining taxpayer compliance (R2-89 Cox deposition).

No Code 8 or Code 9 examinations were assigned to me during the period October 1, 1997 to March 8, 1999. All cases assigned during this period were of low priority. This is in stark contrast to those cases assigned to me over the prior nine (9) year period (R2-66).

On March 8, 1999 I was assigned a high priority examination of a CEP qualified entity in Florida. Later that day I was offered and declined the audit of two CEP entities as a member of Group 7201 in Baltimore (Division Headquarters). I declined the out-of-state audits in that the assigned Florida examination was very large and complex. The offer begs the question of why I was not presented with an offer to work for the Group 7201 Baltimore manager during the period prior to March 8, 1999.

I find no legitimate business reason for the discriminatory conduct of the Secretary in that it was not directed to the business purpose of the Internal Revenue Service by insuring taxpayer compliance.

The "ultimate question" in a disparate treatment case is not whether the plaintiff established a prima facie case or demonstrated pretext, but whether the defendant intentionally discriminated against the Plaintiff. United States Postal Service Board of Governors v. Aikens, 103 S. Ct. 1478 (1983).

CONCLUSION

Two hundred plus years ago Americans believed in principles which they thought were worth fighting and dying for. After the fighting was over they developed a Constitution and Bill of Rights to indemnify those principles. This Complaint is not about work assignments. This Complaint is about the abuse of those principles within the Internal Revenue Service as specified in the pleadings.

Thank you.

Respectfully submitted via certified mail this twenty-seventh day of December, 1999.

"S/Melvin E. Blough" pro se

Melvin E. Blough
803 Tomahawk Trail
Brandon, FL. 33511
(813) 651-3158

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that a true and correct copy of the foregoing has been provided via certified mail to Assistant United States Attorney Susan Roark Waldron this twenty-seventh day of December, 1999.

"S/Melvin E. Blough" pro se

99-2435-FF
99-13735-FF

CONSOLIDATED APPEAL

In The United States Court of Appeals For The Eleventh Circuit

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MELVIN E. BLOUGH,

Plaintiff-Appellant

versus

LAWRENCE SUMMERS,
Secretary of the Treasury,

Defendant-Appellee.

CONSOLIDATED APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION
(D.C. Docket NO. 98-01358-CV-T-24E)

PETITION FOR REHEARING EN BANC UNDER RULE 35 OF THE FEDERAL RULES OF APPELLATE PROCEDURE

MELVIN E. BLOUGH
Pro Se - Appellant
803 Tomahawk Trail
Brandon, FL 33511
(813) 651-3158

BLOUGH v. SECRETARY, DEPARTMENT OF THE TREASURY

(11th Cir. - Consolidated Appeal No. 99-2435-FF and 99-13735-FF)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In compliance with Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, the undersigned hereby certifies that the following listed persons and entities have an interest in the outcome of this case:

1. Roberta Bahnsen, Assistant United States Attorney, district court co-counsel for Secretary;

2. Melvin E. Blough, plaintiff-appellant, pro se;

3. Donna A. Bucella, United States Attorney;

4. The Honorable Susan C. Bucklew, United States District Judge;

5. Secretary of the Treasury, defendant-appellee;

6. Tamra Phipps, Assistant United States Attorney, Chief, Appellate Division;

7. Yvette Rhodes, Assistant United States Attorney, Appellate Division;

8. Susan Roark Waldron, Assistant United States Attorney, appellate counsel for Secretary.

9. The Honorable Charles R. Wilson, United States Circuit Judge, former United States Attorney

(interested solely in his capacity as former United States Attorney); and

10. Warren A. Zimmermam, Assistant United State Attorney, Chief, Civil Division, district court co -counsel.

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STATEMENT OF THE ISSUES ASSERTED TO MERIT EN BANC CONSIDERATION:

1. Whether the district court improperly dismissed my motion to amend the Complaint to include a claim of constitutional deprivation of a fundamental and protected fifth amendment liberty interest by the United States Government.

2. Do totally and permanently disabled veterans have a fundamental and constitutionally protected liberty interest which prohibits continuous acts of employment related threats of physical injury, discrimination and retaliation by the United States Government ?

3. "Nothing contained in this title shall be construed to repeal or modify any *Federal*, State, territorial, or local *law creating special rights* or preference *for veterans*." Section 712 of the Civil Rights Act of 1964 (Title 42 U.S.C. section 2000e-11). Does recognition of the Constitutional right, as presented as issue number two above, provide a *special right* directed to totally and permanently disabled veterans in the employ of the United States Government ?

4. Whether the district court abused its discretion in the granting of the request for summary judgment.

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE:

The district court did deny my request for a preliminary injunction and in a separate opinion did grant the Secretary's motion for summary judgment in my Complaints under Title VII of the Civil Rights Act

of 1964 and the Rehabilitation Act of 1973. The district court did concurrently deny as moot my motion to amend the initial Complaint to include a claim of Constitutional deprivation.

I did appeal both decisions and the appeals have been consolidated before this Court.

On May 9, 2000 a Panel of this Court did summarily deny my appeal based upon the findings of the district court.

On June 7, 2000 a clerical error did improperly precipitate issuance of a mandate by this Court as the time within which I may seek rehearing is forty-five days after entry of judgment in that an agency of the United States is party to this litigation. A motion to recall mandate was filed with the Court on June 10, 2000.

STATEMENT OF FACTS NECESSARY TO ARGUMENT OF ISSUENUMBER ONE:

The subject motions (R3-97 and R3-104) were properly filed with the district court and referenced in Plaintiff's Response to Defendant's Motion For Summary Judgment (R3-107 pg 22 item 1) in the Complaint of discrimination under Title VII of the Civil Rights Act of 1964.

The Order of the district court granting Agency motion for summary judgment (R3-111) did render moot all pending motions; including the motions to amend the Complaint to include a claim of constitutional tort against the United States Government (R3-97 and R3-104). The Order by the district court failed to state justification for the dismissal. The Brief of Appellee

and the Panel decision of this Court are also silent as to the justification for the dismissal.

ARGUMENT AND AUTHORITIES RELATIVE TO ISSUE NUMBER ONE:

In general a case becomes moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome. Murphy v. Hunt, 102 S. Ct. 1181 (1982).

We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today. Because the Court of Appeals erroneously applied the legal standard applicable to Title VII cases in resolving the constitutional issue before it, we reverse its judgment in respondents' favor. Washington v. Davis, 96 S. Ct. 2040 (1976).

The District Court cannot, in the exercise of its discretion, treat as "final" that which is not "final" within the meaning of section1291. But the District Court may, by the exercise of its discretion in the interest of sound judicial administration, release for appeal final decisions upon one or more, but less than all, claims in multiple claims actions. The abuse of that discretion remains reviewable by the Court of Appeals. Sears, Roebuck and Co. v. Mackey, 76 S. Ct. 895 (1956).

The grant or denial of an opportunity to amend pleadings pursuant to Federal Rules of Civil Procedure Rule 15(a) is within the discretion of the Federal District Court, but outright refusal to grant leave without any justifying reason appearing for the denial is not an exercise of discretion, and is merely abuse of

discretion and is inconsistent with the spirit of the Federal Rules. Foman v. Davis, 83 S. Ct. 227 (1962).

Absent any justifying reason; the district court ruled improperly (R3-111) that my motions (R3-97 and R3-104) to amend the Complaint were moot.

The motions in question were based upon direct evidence of intentional retaliation which is dispositive of all issues before the district court.

The issue is worthy of en banc consideration in that the silence of the district court and this Court has placed a cloud over the legal remedies available to me in my claim of constitutional tort against the United States Government and is an abuse of discretion which is inconsistent with the spirit of the Federal Rules as the United States Supreme Court has noted in *Foman, supra.*

STATEMENT OF FACTS NECESSARY TO ARGUMENT OF ISSUE NUMBER TWO:

The Panel's decision is silent as to this question of law. A claim of constitutional deprivation of a protected liberty interest was presented within the motion for preliminary injunction (excerpt Doc. 25, R4-32). The decision by the district court was also silent as to the assertion of an established constitutional right (R1-28, R4-32).

I am one of approximately fifty-one thousand combat disabled veterans recognized as totally and permanently disabled by the Department of Veterans Affairs. I have two artificial legs and loss of use of one hand as a result of service in Vietnam (excerpt Doc. 25 correspondence dated 3/19/97 Department of Veterans Affairs).

ARGUMENT AND AUTHORITIES RELATIVE TO ISSUE NUMBER TWO:

The right is fundamental because it is preservative of all rights. Yick Wo v. Hopkins, 6 S. Ct. 1064; Harman v. Forssenius, 85 S. Ct. 1177 (1965).

Appropriate limits on substantive due process come not from drawing arbitrary lines but from careful respect for the teachings of history and solid recognition of the basic values that underlie our society. Moore v. City of East Cleveland, Ohio, 97 S. Ct. 1932 (1997).

Washington v. Glucksberg, 117 S. Ct., 2258 (1997) as presented in Brief for Appellant at page 1.

"A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all. Decision on this **purely legal question** permits courts expeditiously to weed out suits which fail the test ....." Siegert v. Gilley, 111 S. Ct., 1789 (1991).

Based upon the standards established by the United States Supreme Court, I have a fundamental and constitutionally protected liberty interest which prohibits continuous acts of employment related threats of physical injury, discrimination and retaliation by the same government which put me in harms way in Vietnam.

The American people have provided *special rights* and preferences to disabled veterans since the revolutionary war.

This issue warrants en banc consideration in that the United States Government has violated the constitutional rights of an American who became disabled in the service of his country. The constitutional rights of all Americans were therefore infringed upon.

STATEMENT OF FACTS NECESSARY TO ARGUMENT OF ISSUE NUMBER THREE:

I have been recognized by the federal government as a totally and permanently disabled veteran since 1971. I have been an employee of the federal government since 1979.

Secretary's opposition (R3-99) to my motions to amend the Complaint to include deprivation of constitutional liberty interest (R3-97 and R3-104) rests upon the claim of sovereign immunity and the assertion that Title VII of the 1964 Civil Rights Act constitutes the exclusive remedy for employment discrimination in the federal workplace under Brown v. General Services Administration, 96 S. Ct., 1961 (1976).

ARGUMENT AND AUTHORITIES RELATIVE TO ISSUE NUMBER THREE:

"It is only invidious discrimination which offends the Constitution". Ferguson v. Skrupa, 372 U.S. 726 (1963).

The United States Government has no claim to sovereign immunity in claims of invidious discrimination.

Discrimination may be so unjustifiable as to be violative of due process. Detroit Bank v. United States,

63 S. Ct. 297; Bolling v. Sharpe, 74 S. Ct. 693 (1954); Schneider v. Rusk, 84 S. Ct. 1187 (1964).

Unconstitutional federal employment discrimination was deemed actionable in the Federal Courts based upon a claim directed to the due process clause of the Fifth Amendment. Davis v. Passman, 99 S. Ct. 2264 (1979).

The United States Supreme Court did state in *Brown v. General Services Administration* that "federal employment discrimination clearly violated the Constitution" with citation to Bolling v. Sharpe, 74 S. Ct. 693 (1954).

"We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." Connecticut Nat. Bank v. Germain, 112 S. Ct. 1146 (1992).

"Generally, a law will survive scrutiny under the equal protection clause if the distinction rationally furthers a legitimate state purpose." Hooper v. Bernalillo County Assessor, 105 S. Ct. 2862 (1985).

"Congress simply failed explicitly to describe section 717's position in the constellation of anti-discrimination law. We must, therefore, infer intent in less obvious ways." Brown v. General Services Administration, 96 S. Ct. 1961 (1976).

"Civil Rights Act of 1964, as amended, provides exclusive judicial remedy for claims of discrimination in federal employment". *Brown, supra.*

"Section 717 is now the exclusive remedy for charges of discrimination brought against federal employers." Porter v. Adams, 639 F.2d 273 (5th Cir. 3/13/81).

"Section 717 leaves undisturbed whatever remedies petitioner might otherwise possess." Davis v. Passman, 99 S. Ct. 2264 (1979).

Section 717 restriction on remedy was inferred by the United States Supreme Court in *Brown v. General Service Administration* ; however the language of Section 712 of Title VII is explicit, unambiguous and unchanged since Congressional enactment.

Section 712 of Title VII Civil Rights Act of 1964 was born of the United States Constitution and Congress did by statute bridge the gap between said Act and the Constitution. No provision of Title VII may restrict a veterans constitutional rights and the Courts, not legislative bodies, are charged with the duty to interpret the legitimate rights of veterans under the Constitution of the United States.

Reliance by the Secretary on *Brown v. General Service Administration, 96 S. Ct. 1961 (1976)* is misplaced based upon the express provision of Congress under section 712 of Title VII of the Civil Rights Act of 1964 and the finding by the United States Supreme Court that discrimination by the United States Government may be so unfair as to violate Fifth Amendment rights.

Section 712 of Title VII of the Civil Rights Act of 1964 (USC Title 42, Chapter 21, Subchapter VI, section 2000e-11) provides that Title VII is not the exclusive remedy for a veteran who in this case has been recognized by the United States Government as service connected in a state of permanent and total disability. The fact said veteran is an employee of the United States Government should not deprive him of his Constitutional rights.

Section 712 of Title VII was not referenced in *Brown v. General Service Administration nor Porter v. Adams* and therefore was not a fact in consideration by the Courts.

Based upon the facts specific to this Complaint; en banc consideration is appropriate to resolve the conflict which exists between sections 712 and 717 of the Civil Rights Act of 1964, as amended.

STATEMENT OF FACTS NECESSARY TO ARGUMENT OF ISSUE NUMBER FOUR:

BASIS OF COMPLAINT

In the response the defendant's motion for summary judgment I did specify the basis for the Title VII Complaint to include direct evidence of retaliation (requirement to work for Prowler to conduct CEP examination as specified in the memorandum of Nov. 18, 1997 from Division Chief Cox R2-89 exhibit 3 deposition June 28, 1999) and evidence of indirect retaliation (i.e.no CEP or Code 8/9 examinations assigned and only the smallest cases were assigned 10/1/97 through 3/8/99). This claim was consistent with the allegations within the initial Complaint (R1-1-3).

"Specifically, plaintiff alleges that the re-organization which led to the creation of group 7214 was done in retaliation against him for his prior administrative and EEOC Complaints" (Order of district court granting summary judgment R3-111-3).

PRETEXT

During the deposition of June 28, 1999 (R2-89-26-27) Mr. Cox did explain in detail the basis for the

reorganization of the Division in 1997 and my response was "I understand. That's quite logical."

The following testimony was provided by me during the course of my deposition (R2-75-exhibit C pages 25-42) and focus upon the appointment of Prowler as CEP manager:

"Two acts of discrimination. Prowler CEP. I got to work for him if I want to do CEP. CEP sitting out there by themselves without Prowler as the manager, I still can't do them. There's two forms of discrimination. One, the actual act itself of appointing Prowler as the manager and saying if you work CEP, you work for Prowler. The other they're sitting out there. You can't do them non-CEP and work for another manager. There's two acts there."

"Prowler as the group manager in itself that's not retaliatory unless I'm compelled to work for him. But the fact is I was compelled to work for him if I wish to do CEP."

"The administrative acts referenced (reorganization of the Division and appointment of Prowler) do not relate to; however are being presented in an effort to justify retaliatory conduct on behalf of defendant" (my motion in opposition to summary judgment R3-107-16).

The following factual representations were presented during the deposition of Division Chief Cox on June 28, 1999 (R2-89):

Cox acknowledges statement of Nov. 16, 1998 that "there are 275 CEP - identified examinations in the southeast region and more in Florida than we can do in the next 100 years" (pages 43-44).

I inquired as to why no CEP examinations were initiated in northern, central or southwestern Florida during 1995-96-97-98 other than the one which I performed. Response by Cox: "We just didn't have the resources quite honestly" (pages 53-54).

I referenced the Internal Revenue Manual section which provides that CEP identified cases can be excluded from the program "for any reason" and provided a copy of IRM section 7(10)(18)4.2(2) (R2-89) to Cox. It had been acknowledged during the discovery process that none were excluded during the period 1995 through 1998 (R2-89) and I inquired as to why none were excluded in view of the fact that there were more in Florida than we can do in the next 100 years and I had been assigned cases below my grade level Oct. 1, 1997 through March 8, 1999. The response from Cox was that said examinations are very complex and can only be worked properly under the CEP program. I did respond that I had worked six CEP qualified cases (only one of which was conducted under the CEP program) and they can be done very effectively outside the CEP program. No response was provided by Cox (pages 45-49).

"The procedure for excepting cases from the (CEP) program is cumbersome and requires the ultimate approval of the national office." Declaration of Division Chief Cox (R2-77-5).

"Plaintiff recognizes that the procedure for excluding CEP cases and handling them through the regular program is a cumbersome one" Defendant's motion for summary judgment (R2-75-18). This is not a true statement and was denied in my response to the motion for summary judgment (R3-107-18).

THREATS

The initial Complaint (R1-1-2) references the 1991 and 1995 threats of physical injury to me by Group Manager Ron Prowler.

Secretary acknowledges in Answer to Complaint (R1-8-3,4) that no disciplinary actions were taken against Prowler regarding either threat.

Depositions of third-parties Gary Maxwell (R2-89-exhibit C pages 16, 17, 69-73) and Group Manager Genny Farley (R2-89-exhibit C pages 13, 14) attesting to the September 23, 1991 and September 21, 1995 threats of physical injury to me by Prowler.

Deposition of Melvin Blough (R2-75-exhibit B):

Testimony relative to threat by Prowler which occurred on September 23, 1991 (pages 46, 47).

Testimony relative to threat by Prowler which occurred on September 21, 1995 (pages 77-79).

Testimony regarding direct evidence of retaliation (pages 80-84):

"They never offered to allow me to work for another CEP manager or anything else. It was either you work for Prowler or that's it."

"It was in retaliation, right. Requiring me to work for an individual that had threatened me in the past, that's called -- that's retaliation."

The Division Chief's were notified of the threats by Prowler in a memorandum dated September 23, 1991 (R2-89) and a series of memorandums dated September 18, 1995 through July 7, 1998 in addition to the EEO Complaints of threats, discrimination,

harassment and retaliation 1993, 1995, 1997 (R2-89-exhibit B).

The following facts were acknowledged during the deposition of Division Chief Cox on June 28, 1999 (R2-89):

Decisionmakers Cox and Breslin (Asst. Div. Chief) were involved in the EEO Complaint resolution process (pages 10-11).

Cox/Breslin met with me during the summer of 1995 and I advised them of the 1991 threat by Prowler. Cox told me he would do everything in his power to insure that I did not work for Prowler in the future (page 12).

Cox acknowledges meeting with and being informed by Group Manager Genny Farley of the September 21, 1995 threat by Prowler (page 14).

I inquired of Division Chief Cox regarding the Memorandum of November 18, 1997 (exhibit 3 of deposition) authored by him and requiring me to work for Prowler to conduct examinations of entities within the CEP program:

"Given the prior threats by Mr. Prowler, what were you thinking to even suggest that I work for Ron Prowler" ? Response by Cox: "so I felt that you had a change of heart and you would be willing to work for Ron" (pages 33-35).

Review of the EEO Counseling Report obtained during the discovery process indicates that the author of the November 18, 1997 memorandum was advised by the EEO Counselor prior to the issuance of said memorandum that "Blough has made it clear that he does not want to work for Prowler due to comments

made by Prowler which were the issue of a previous EEO complaint."

DIRECT AND INDIRECT EVIDENCE OF RETALIATION

The initial Complaint (R1-1-3) and the Secretary's response in Answer to said Complaint (R-1-8-4) reference the memorandum dated November 18, 1997 (R2-89-Cox deposition June 28, 1999 exhibit 3) from Division Chief Cox requiring me to work under the supervision of Prowler if I wished to conduct examinations of the largest and most complex entities.

Secretary's motion for summary judgment (R2-75-3) notes that I was permitted to conduct a CEP audit in Florida and was supervised by a group manager in Atlanta (October 1, 1995 through September 30, 1997) subsequent to the September 21, 1995 threat by Prowler.

Under Court ordered discovery (R2-66), Secretary acknowledges that during the nine year period October 1, 1988 through September 30, 1997 sixty-three percent (63%) of my examination time was devoted to six (6) CEP examinations (largest and most complex) and thirty-one percent (31%) to Grade-13 non-CEP examinations. The annual gross receipts did range from $400 million to $1 billion. The Secretary also acknowledged that during the period October 1, 1997 through March 8, 1999 the average gross receipts of the tax returns assigned to me was $5 million.

On the morning of March 8, 1999 (fourteen months after filing EEO Complaint with the Secretary) I was assigned the examination of a coordinated examination program entity under the regular examination program (R3-107-17). On the afternoon of March 8, 1999 I was offered the opportunity to

participate in two CEP examinations, one in Richmond, Virginia and one in Washington, D.C. under the supervision of a group manager other than Prowler (Declaration of Cox R2-77-5).

Deposition of Division Chief Cox on June 28, 1999 (R2-89):

Discussion of failure to assign me Code 8 (annual gross receipt $10 million to $50 million) or Code 9 (annual gross receipts greater that $50 million; however non-CEP identified) cases for examination and fact that I was only assigned cases with average gross receipts of $5 million during the period October 1, 1997 through March 8, 1999. Response by Cox: " I am not sure $5 million even qualifies as grade 13 case (work) quite candidly" (pages 58-60).

Division Chief Cox acknowledges that he provided instructions to Branch Chief and my Group Manager regarding the assignment of cases to me (page 45).

Substantially all the available examination work for grade 13 Exempt Organization Revenue Agents are Code 8 (annual gross receipt $10 million to $50 million) and Code 9 cases (annual gross receipts in excess of $50 million).

DOCUMENTATION OUTSTANDING AT TIME SUMMARY JUDGMENT WAS RENDERED

My response to the motion for summary judgment did specify (R3-107- pages 2, 12, 19, 20) that documentation essential to my Complaint was outstanding pursuant to an Order of the district court (R3-96) and a Rule 37(B)(2) Motion before the district court (R3-109).

The outstanding documents were ordered by the district court (R3-96) after a lengthy discovery hearing at which the Magistrate Judge did provide extensive inquires of me as to the specifics of my claim and need for said documentation.

The court ordered and outstanding documentation was not provided (contrary to the assertion of Appellee in Brief to this Court) and were requested to secure documentation regarding direct evidence of retaliation by decisionmakers Cox and Breslin prior to the issuance of the memorandum of November 18, 1997, threats against other employees by Prowler, and the number/location of Code 8/Code 9 cases available for examination (prima facie case).

ARGUMENT AND AUTHORITIES RELATIVE TO ISSUE NUMBER FOUR:

Secretary, as moving party, has failed to negate an essential element of my claim (i.e. direct evidence of retaliation as presented in the record and pages 10-12 of this petition) and has therefore failed to properly support the motion for summary judgment. Adickes v. S.H. Kress & Co., 90 S. Ct. 1598 (1970).

Where a case of discrimination is made out by direct evidence, reliance on the four-part test developed for circumstantial evidence is obviously unnecessary. Lee v. Russell County Bd. of Educ., 684 F.2d 769 (11th Cir. 1982).

The district court's misguided reference to the "reorganization" as the method of retaliation is erroneous (based upon facts in the record and pages 8-9 "pretext" of this petition). I have denied all inferences to warrant such conjecture by the district court and have in fact stated that the "reorganization"

and appointment of Prowler as CEP manager were not retaliatory; however requiring me to work for Prowler to conduct CEP examination was retaliatory.

In addition to the "reorganization" being offered as a legitimate business reason in requiring me to work for Prowler to conduct CEP examinations, Secretary has asserted that examinations could not be excluded from the CEP program because the exclusion process was "cumbersome" and required national office approval (see discussion of "pretext" pages 9-10 of this petition).

A) Division Chief Cox did claim a different pretext during his deposition pretext as presented in the record and page 9-10 of this petition).

B) The Internal Revenue Manual provides that CEP cases may be excluded from the program (and worked under the regular examination program) for "any reason" and the Form 4791 is a one page document (pretext as presented in the record and page 9 of this petition).

C) The fact that national office approval is required for exclusion should not by inferred as a difficult process.

D) Cox did acknowledge that the exclusion process was never attempted (pretext as presented in the record and page 9 of this petition).

E) Neither the reorganization nor the unsupported inference that the procedure for excluding CEP cases from the program is "cumbersome" present legitimate business reasons for the adverse employment actions of

the Secretary. Texas Dept. of Community Affairs v. Burdine, 101 S. Ct. 1089 (1981).

We have held that "articulating" a legitimate reason means adducing legally sufficient proof to rebut the plaintiff's proof. Jeffries v. Harris County Community Action Assn., 615 F.2d 1025 (5th Cir. (1980).

The evidence was sufficient to create a genuine issue of material fact as to pretext. See *Sparks*, 830 F.2d at 1564 (the implausibility of asserted justifications creates a genuine issue of material fact sufficient to preclude judgment as a matter of Law. Goldsmith v. City of Atmore, 996 F.2d 1155 (11th Cir. 1993).

Neither the motion for summary judgment nor the Order by the district court address the additional acts of retaliation as presented in the record and pages 12-13 of this petition. The Secretary has again failed to negate essential elements of my claim by somehow articulating a legitimate business reason for the following adverse actions:

1. I was excluded from the examination of "Code 8 and Code 9" entities which does in fact comprise substantially all available grade 13 case work.

2. Secretary has acknowledged that I was assigned and limited to work below my grade level (grade 13) during the entire period October 1, 1997 through March 8, 1999.

3. I was not offered the opportunity to work for another CEP manager (other than Prowler) until March 8, 1999.

4. The adverse employment action was well documented in the record. As this Court observed in *Cox v. American Cast Iron Pipe Co.*, 784 F.2d (11th Cir. 1986), "job titles and duties themselves are conditions of employment protected by Title VII."

The casual link between the protected activity and the adverse employment action was Prowler and the knowledge/actions of decisionmakers Cox and Breslin (R3-107-12). The knowledge/actions would include the threats by Prowler, EEO Complaints which I filed, and the memorandum of November 18, 1997 by Cox stating that I must work for Prowler to conduct CEP examinations (with knowledge that I would not agree to do so). The prima facie claim of retaliation was established.

The district court misstated the representations presented in the deposition of Cox and then compounded the error in stating said representation were undisputed (R3-111).

Please note the discussion on pages 13-14 of this petition regarding documentation which was outstanding at time summary judgment was rendered. The actions of the district court were an abuse of discretion based upon Anderson v. Liberty Lobby, Inc. 106 S. Ct. 2505 (1986); Patterson v. United States Postal Service, 901 F.2d 927 (11th Cir. 1990); Dean v. Barber, 951 F.2d 1210 (11th Cir. 1992); Snook v. Trust Co. of Ga., 859 F.2d 865 (11th Cir. 1998).

En banc consideration is warranted based upon the standard that the district court's decision is not supported by the evidence and is clearly erroneous. Canino v. United States E.E.O.C., 707 F.2d 468 (11th Cir. 1983)

CONCLUSION

WHEREFORE, en banc consideration is respectfully requested to address the Federal question presented as issues one, two and three. The silence of the district court and this Court's Panel decision as to the basis for denying the Federal question is an abuse of discretion.

I know the difference between being slighted by the actions of another person versus being punished for my actions. I believe en banc de novo review of the facts and law relevant to issue number four will establish the necessity for trial.

Thank you.

Respectfully submitted under penalty of perjury this twenty-first day of June, 2000.

"S/Melvin E. Blough" pro se

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that a true and correct copy of the foregoing has been provided via certified mail to Assistant United States Attorney Susan Roark Waldron the twenty-first day of June, 2000.

"S/Melvin E. Blough" pro se